

THE NORTH CAROLINA STATE BAR

JOURNAL

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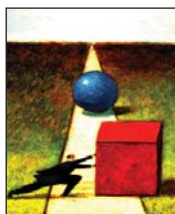
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**North Carolina State Bar
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Impressions from the Quarterly Meeting

BY JAMES R. FOX

Greetings from the staff, officers, and councilors who serve and represent you, the more than 25,000 members of the North

Carolina State Bar. As I write this, the State Bar Council has just finished its first quarterly meeting of the year, and its deliberations left me with some impressions that I want to share. Any opinions expressed are, of course, my own and not necessarily those of the State Bar or any of its members.

The highlight of the week dealt with professionalism. Each year the Chief Justice's Professionalism Award is bestowed on someone who exemplifies the spirit and exercise of professionalism in his or her life. This year the award went to Raleigh lawyer Robert McMillan, who began practicing in the Capital City in 1949. A film interview of Mr. McMillan done by Wade and Roger Smith was shown. A number of other well known North Carolina lawyers also appeared in the film. They all spoke of the abiding influence Mr. McMillan had exerted on their personal and professional lives. Their judgment uniformly was that he was the best man and most professional lawyer they knew. After receiving the award, Mr. McMillan made a few remarks, interlaced with his well-known humor and highlighting his views on professionalism from the vantage point of more than 60 years of law practice. His theme was that the law is a profession, not a business. A major observation was that law practice is something that ought to be engaged in as an end in itself, dedicated to personal service and civic duty, rather than focused on money. It brought to mind this quote on professionalism from the noted legal educator and scholar, Dean Roscoe Pound. Pound observed:

There is much more in a profession than a traditionally dignified calling. The term

refers to a group of persons pursuing a learned art as a common calling in the spirit of public service—no less a public service because it may incidentally be a means of livelihood. Pursuit of the learned art in the spirit of public service is the primary purpose. Gaining a livelihood is incidental, whereas in a business or trade it is the entire purpose.



Amen. Without disparaging honorable and productive business activities in any way, what distinguishes the activities and obligations of business from those of law are the duties of public service, loyalty, trust, confidentiality, competence, and avoidance of conflicts of interest that are required of lawyers. This brings up the current debate over whether to permit minority investment in law firms by nonlawyers. Those who favor such investment often argue that in at least some of the extant proposals, lawyers will still have voting control, and that the blended firms they seek will lower rates to clients. Both arguments were recently addressed in a blog interview with IBM General Counsel Robert Weber who opposes permitting such investment. Mr. Weber, a man who knows more than a little about both law and business, was asked why the problems he foresaw in such structures couldn't be remedied by limiting nonlawyer ownership to a degree that would leave lawyers in control. He opined that:

Only the most naïve will think that limited ownership is where it will stop. As nonlawyers and investors and financiers begin owning law firms, that direct relationship, that agency-fiduciary relationship between lawyer and client, is going to become muddled.

He was then asked if outside investment wouldn't allow law firms to lower their rates, and he responded that this wasn't the "least bit true." Rather, he said:

The partners can contribute working capital or they can borrow—and those rates are pretty low. If they bring in outside investors, the investors are going to want more of a return than you pay on borrowing. So the business model doesn't work. To say this is a client friendly, cost lowering business model is contrary to economic reality.

As someone who from time-to-time prosecutes or defends minority shareholder suits, I raise an additional difficulty. This kind of litigation is often the legal equivalent of mud wrestling—both messy and unusually acrimonious. When applied to the blended firm structures that have been sought in this state and elsewhere, it would likely be even more so. Let's suppose the blended firm's lawyer shareholders want to take a controversial *pro bono* case. The nonlawyer shareholders object that it would lower the return on their investment, and perhaps drive away other business. If the lawyers nevertheless proceed, they put themselves squarely in the gun sights of a minority shareholders suit. Who among you, knowledgeable about minority shareholder controversies, would maintain that such situations can't arise and won't generate the result suggested? In my view there is an inherent conflict of interest in the blended firm model that is damaging to the obligations of competence, public service, loyalty, trust, and confidentiality that are central to our profession. Why should the price of adhering to the values and requirements of our Rules of Professional Conduct be litigation?

Another major concern voiced at the State Bar quarterly meeting this week had to do with technology—and more specifically, whether it was changing the nature of our profession fundamentally and forever. I see very little reason to think so. This subject reminds me of my farmer grandfather. When I was a small boy he used to take me fishing in the pond he had built behind his dairy barn. Sometimes we stayed all day. Correction—he stayed all day. I only stayed until the sandwiches ran out.

These outings always came with a strong dose of the imminent apocalypse. My grandfather was convinced that the world was teetering on the brink of economic ruin and atomic incineration. Listening, I remember thinking that a pretty dim future awaited me.

Well, the years came and went. The country underwent the biggest economic expansion in its history, and the Communists didn't incinerate us in our beds. Now what has this got to do with the practice of law and whether technology will change our profession fundamentally and forever?

Just this: Without doubt, major technological changes are occurring, and undoubtedly more await us. But unlike my grandfather, we needn't fear professional Armageddon. For example, my computer makes the mechanics of turning out a brief a lot easier and faster, but it doesn't enhance the research, the quality of the analysis, or the nature of the expression. Similarly, the legal forms I maintain in my office sometimes give me a leg up on a corporate project, but over many years, I have yet to use one without modifying it, and the choice of a form to begin with requires application of a reservoir of education and experience.

Put another way, software isn't about to replace the application of sound legal training and experience, and those who represent or imply for profit that it will are not being candid or professional. Competence is a linchpin of ethical legal practice and it comes at the expense of a lot of time in the library and on the job, not at the click of a mouse.

With or without technology, there will always be a place for lawyers who provide services with a value add for clients. The value add involves knowing a client's business or personal situation well, and helping to solve problems and meet needs that can't be met alone or that wouldn't even be known without the help of a lawyer. Clients will always be willing to hire a lawyer and to pay him or her a reasonable fee for professionally rendered, value added service.

There was additional buzz at our quarterly council meeting about the continuing oversupply of new lawyers being turned out by law schools, and the intended and unintended effects of this phenomenon. I have yet to hear anyone offer an effective and legal way to rein in law school admissions policies or the desire for a professional degree without regard to its utility in the marketplace. Over the long haul, the market will undoubtedly impose some constraints, but not without some highly



Leonard T. Jernigan, Jr., attorney and adjunct professor of law at NCCU School of Law, is pleased to announce that his 2011-12 supplement to Jernigan's *North Carolina Workers' Compensation: Law and Practice, with Forms* (4th edition) is now available from West, a Thomson Reuters business (1-800-344-5009).

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unfortunate personal and professional effects. In the meantime, there is a clear need to keep these new admittees from damaging the public, the profession, and themselves. Many of them are operating under staggering debt loads and will, debts or not, find it difficult to generate adequate practice income to support themselves. Moreover, most will not be practicing in circumstances that provide appropriate early training or association with mentors who are models of professional values. If they don't get these things from older, more accomplished lawyers, they simply aren't going to get them. In other words, effective mentoring is required to avoid public and personal damage. We are justifiably proud of our new mandatory practice and professionalism program, but we can't claim it offers anything like a complete solution. Indeed, there is likely not a single solution. It will take the combined efforts of the Bar Association, the State Bar, and the local District Bars—not to mention many individuals—and a real spirit of volunteerism for there to be any effective response to this problem. Making yourself available for such service is, in my opinion, the essence of professionalism.

The good news is that the matter seems now firmly on everybody's radar. In addition to the conversations to which I was a party at our quarterly meeting, this issue was the subject of spirited discussion at a meeting of the Chief Justice's Commission on Professionalism I attended this week. My hope is that with this much attention being focused on the problem from so many different directions, something will actually get done.

A final matter that often generates discussion at quarterly meetings—and did this time—is court underfunding. It is notable in this regard that a year ago then ABA President Stephen Zack appointed a Task Force on the Preservation of the Justice System. This group, which deals largely with court funding, has been continued by his successor, Bill Robinson. Robinson convened a well-publicized symposium on the subject last fall. The meeting opened with a speech by former Duke Professor Erwin Chemerinsky, who noted that a major factor in underfunding was simple politics. He stated that "the judiciary isn't a

CONTINUED ON PAGE 9

Paralanthropy

BY L. THOMAS LUNSFORD II

Before my meteoric rise through the legal ranks at the State Bar, I was a general practitioner with a small firm in my hometown of Burlington for two years. Although I possessed what was then regarded as a decent legal education, I was remarkably ill-equipped to succeed in the jurisprudential hothouse that was Alamance County. I was, in two words, a “serial incompetent.” On Monday, I ineffectively represented accused felons as their court-appointed counsel; on Tuesday, I misapplied the Bankruptcy Code; on Wednesday I missed out-conveyances and easements in the deed vault; on Thursday, I planted time bombs in testamentary documents; and on Friday, I demurred. OK, maybe I’m exaggerating a bit, but it really is undeniable that most of the lawyers who were minted during the waning days of the Carter administration were, like me, scarcely prepared to accomplish much of anything. I didn’t know how to draw a complaint, search a title, or pick a jury, and neither did the other new lawyers with whom I often commiserated. I had no idea how to interview a client, negotiate with another lawyer, evaluate a case, or act consistently like a grown-up. I was, of course, well-schooled in the art of drafting briefs and inter-office memos, and could have perhaps managed a “railroad reorg” had one walked in the door. But mostly I was ignorant. Fortunately, there existed a culture then of “benign adversariness” in our local legal community. The older lawyers, who had each surmounted their own educational deficiencies with the help of their professional predecessors, were generally available to coach the novice in cases in which they weren’t personally involved, and were generally disposed not to take advantage in matters in which they did participate. Over time, most new lawyers were alchemically invested with

the necessary skills and sense to be effective. Still, it was an imperfect system that was already beginning to unravel when I showed up. The lawyer population was burgeoning, the economy was tanking, and the nurturing web of relationships within the bar was becoming strained. I was unhappy.¹ I was drowning in the sea of my own insecurity and ineptitude.



And then, miraculously, I was rescued—as a real property lawyer at least—by a paralegal, and thus became aware for the first time of the great generosity of spirit that characterizes that branch of the legal profession. The paralegal was Charles McDaniel and, when it came to the fundamentals of title examination, he was, practically speaking, Alamance County’s finest real estate lawyer. As I recall, he had worked for the county’s tax department for many years and knew more about Blackacre than anyone then living. My senior partner,² who happened to be Mr. McDaniel’s only serious rival for the title of best local “dirt lawyer,” hired him and put him in charge of me and my education. It was one of the best things anyone ever did for me as an attorney. Like many licensed lawyers before and since, I was graciously and thoroughly edified by the man I ostensibly supervised, even as he dutifully served me and, derivatively, my clients, as “my” paralegal.

It is difficult to know exactly when Charles McDaniel became a “paralegal.” Although the term was probably not invented to describe him, it should have been. He was the genuine article and fully deserved the title. I suspect that he was the first person in Alamance County to be so called. In any event, he personified and professionalized the occupation in my limited experience. He was utterly competent, he was dedicated to assisting the lawyer for whom he worked, he was indispen-

sable to the provision of legal services of good quality, and he had a great heart.

I am pleased to note that the spirit and example of Charles McDaniel lives on among the paralegals of today, and is particularly evident in the State Bar’s Board of Paralegal Certification. That body, which superintends the process by which thousands of people like Mr. McDaniel³ are positively identified as well qualified, is the public face of one of the State Bar’s most successful programs. Through its efforts, the board has helped unify and legitimate the paralegal profession. By keying certification to an exacting educational standard, and by requiring the passage of a credible examination, the board has infused its credential with real significance—to both paralegals and lawyers.

When the program was conceived back in 2005, it was imagined that its development would to some extent mirror the growth of the State Bar’s legal specialization program. That worthy enterprise took several years to attract enough participants to reach “critical mass” and become financially viable. In contrast, the paralegal certification program, thanks at least in part to fairly liberal provisions for initially “grandfathering” experienced people like Charles McDaniel, surprised almost everyone by achieving financial independence in fairly short order. Indeed, with over 4,000 applicants in its first two years, the board’s modest fee structure⁴ quickly yielded revenue in excess of that required to operate the program. This unanticipated bounty presented the board with an interesting problem: what to do with the extra money? After watching its treasury expand for a couple of years, the board concluded that the surplus funds needed to be put to good use—and distributed in ways that would signify the paralegals’ involvement in the administration of justice. A committee of the board, consisting of two paralegals and a lawyer, was formed and various ideas were considered. Ultimately, it was decided that the bulk of the money, \$500,000, could be

best used to provide a down payment on the legal profession's new home—the North Carolina State Bar's new headquarters building in the State Government Complex in downtown Raleigh. Accordingly, in October 2009 the board presented a check in the prescribed amount to then State Bar President John B. McMillan in a formal ceremony at the State Bar's Annual Meeting. This breathtaking gesture, signifying the paralegal profession's common cause and symbiotic relationship with the organized Bar, is unlikely to be exceeded by any other single contribution. It will be recognized prominently and permanently⁵ on the premises.

The board's largess did not end with its gift to the lawyers of North Carolina. It followed up in 2011 with another magnanimous act of charity—also intended to enhance the administration of justice. In October 2011 the board publicly presented a check on behalf of its certified paralegals in the amount of \$100,000 to the State Bar's IOLTA program to fund grants to increase access to justice. In a time of economic distress when IOLTA revenues are greatly depressed, the paralegals' contribution is making a huge difference in the lives of many people who would otherwise be denied representation in critical matters. One hopes it will inspire our lawyers to respond more individually and collectively to the urgent need for legal services.

And, as if that weren't enough, the paralegals through their board recently found another deserving object for their generosity, and their diminishing cash reserves. It turns out that the Americans with Disabilities Act requires lawyers who undertake the representation of hearing-impaired clients to provide reasonable means for enabling their clients to communicate. This generally means that the lawyer must hire a translator at his or her own expense. Obviously, this could make it uneconomical to pursue or defend small claims. Perceiving a situation where a little money could do a lot of good, the board at its January 2012 meeting was persuaded to donate \$5,000 to fund a new program at the State Bar through which reimbursement will be provided in appropriate cases to lawyers who find it necessary to hire translators for their hearing-impaired clients. This time there was no fanfare, just another good deed among many for which our allied profession deserves tremendous credit.

I'm pleased to tell you that we at the State Bar fully recognize the value of paralegal assis-



Renny Deese (R), Paralegal Board Chair, presents a check to Hank Hankins (L), IOLTA Board Chair.

tance and the meaning of certification. At the moment, we employ nine certified paralegals. We exploit them shamelessly and proudly, and gladly foot the bill for their required continuing paralegal education (CPE) and annual renewal fees. Although I don't often venture into the practice of law anymore myself, I always make a point of keeping a certified paralegal close whenever I do. Little wonder then that in my current occupation, for which I was of course terribly unprepared at the onset, I have often yearned for the assistance of a certified para-bar executive.⁶ ■

L. Thomas Lunsford II is the executive director of the North Carolina State Bar.

President's Message (cont.)

particularly powerful interest group." Others noted that it was important to get businesses—a very powerful interest group—to understand that an accessible court system is essential to the vindication of their interests; in particular, certainty, predictability, and efficiency. Chemerinsky, a constitutional law authority, also opined that "the legislature cannot deny funding for the courts to perform essential functions without violating separation of powers." Robinson reemphasized in his closing remarks that it isn't enough for the legal community alone to recognize the impact that budget cuts are having on the ability of courts to protect rights and provide a forum for individuals and businesses to resolve their disputes.

North Carolina is certainly no stranger to court underfunding. Mobilizing the court sys-

Endnotes

1. My dismay was related in part to the fact that ours was primarily a "real estate" firm, which was not a bad thing to be when interest rates were in the single digits. Unfortunately, inflation was roaring in the late '70s and rates skyrocketed. Conveyancing and firm revenues began to dry up. It was against this background that the owners of the firm prudently decided to "double down" on my lingering incompetence and reduce costs by making me a partner.
2. Louis C. Allen Jr.
3. There are currently 4,251 board certified paralegals in NC.
4. \$125 application fee, \$50 exam fee, \$50 annual certification renewal fee
5. Or at least for the duration of the Bar's 99-year groundlease with the state of North Carolina.
6. Though certifiable, our assistant executive director, Alice Mine, has never been certified.

tem's important allies is as critical here as elsewhere, and that includes those in the business community. Our very liberty is wrapped up in our court system. Exerting our collective influence to redress the court funding crisis is as important an exercise of professionalism as I can imagine.

What all the above problems have in common is that they, and many others, can be affected in a positive way by your professionalism. The avenues for exercising your own professionalism are numerous, and we all have access to them. Let's pursue them, keeping in mind that we are engaged in a profession, not a business as Mr. McMillan and Dean Pound both so aptly observed. ■

James R. Fox is general counsel, corporate secretary, and vice-president for risk management at Pike Enterprises, Inc., and of counsel to the Winston-Salem firm of Bell, Davis and Pitt, PA.

A Plea to Fight for the Preservation of the Justice System

BY BILL ROBINSON III

We all experience delays that slow down and frustrate our daily lives, from traffic jams on a city street to long lines at a grocery

store. But some delays are more than an inconvenience—these delays threaten the very core of our constitutional democracy.

For several years, the American Bar Association has identified a troubling trend in our state courts as a result of increasing workloads and declining budgets.

State judiciaries handle approximately 95% of all cases filed in the United States, according to the National Center for State Courts (NCSC). In 2008, the most recent year for which data is available, states reported 106 million incoming trial court cases—the most in 35 years. Anecdotally, we know that trend has continued as more people represent themselves and legislators add more laws to the books.

NCSC says 32 states—including North Carolina—reduced their court budgets in fiscal year 2010, and cuts have continued from Hawaii to Maine in 2011. The Supreme Court of North Carolina says the judicial branch budget faced \$13 million in cuts in fiscal year 2010–11, following a \$30.7 million reduction the year before.

Despite these cuts to the already dwindling judiciary budget, state courts were warned of major cuts to their budget for fiscal year 2011–12, and were asked to look for savings in 2011 that could carry over to combat the state's projected \$3.7 billion deficit.

The judiciary answered the legislators' call to action and implemented a Voluntary Reduction-In-Force, which eliminated 194 staff positions and saved \$13 million. Since 2008, the judiciary has cut 700 jobs to save money, causing a backlog in cases and diminishing access to justice for North Carolinians.

Courts around the country have made difficult decisions just as they have in North Carolina. New Hampshire delayed civil trials for a year. A municipal court in Ohio announced that no new cases could be filed

unless the litigants brought their own paper to the courthouse. In Alabama, a judge asked the charitable arm of a local bar association to donate money to help pay juror stipends.

People should never have to jump over budgetary hurdles to reach the courtroom. If our legal system isn't accessible, then it can't be just and it won't be fair.

The constitutional argument for sustainable funding for our courts is simple: The judiciary is a co-equal branch of government responsible for protecting our rights. The practical argument is equally compelling: The courts decide matters that go to the very core of our daily lives, such as when a parent petitions for custody of a child or



when a family fights foreclosure of their home.

The financial argument is stunning: Judiciaries typically receive just 1% of a state's entire budget; that's often less than a state allocates for an executive branch agency. In North Carolina, the courts receive 2.3% of the budget pie to serve more than nine million residents.

Members of the legal community are beginning to understand this situation and are taking action.

Our colleague, Mark Martin, senior associate justice on the North Carolina Supreme Court, commented on the state of the judiciary at a recent symposium on court underfunding in my home state of Kentucky. "At a minimum, we can agree most of us don't expect improvement in the court funding crisis," he said. I couldn't agree more.

To their credit, courts are doing their part to demonstrate efficiency and innovation, including those in North Carolina. The payment of fines and fees is now conducted online; and the courts use e-filing, an electronic document management system.

The ABA is continuing the work of its Task Force on Preservation of the Justice System, bringing together those affected by this crisis to discuss strategies to help our judiciary. The task force has created a venue to share court funding stories and creative ideas at bit.ly/mPjNoc.

The ABA is also working with state and local bar associations to rethink how to sensibly spend taxpayer dollars to ensure public safety. In 1974, about 175,000 people were incarcerated in state prisons in the United States. In 2010, that number had risen to 1.4 million, an increase of 705%.

Then there's the issue of the punishment fitting the crime. In some states fish and game violations, dog leash violations, and feeding the homeless are offenses punishable by time in jail. We need to decriminalize minor offenses, utilize pre-trial release, and implement effective re-entry programs, among other reforms.

North Carolina Drug Treatment Courts are one example of an effective alternative to incarceration. According to North Carolina's Administrative Office of the Courts, drug

treatment courts provide intensive judicial supervision and treatment plans to offenders, and save \$4,000 to \$12,000 per offender. Last year alone, 1,881 offenders participated in drug treatment courts at nearly a 50% success rate.

Finally, we must articulate what courts do and why they are so essential by more effectively educating legislators and the general public—especially young people, because that civic knowledge will drive a renewed dedication to the preservation of our justice system.

Courts must be open, available and adequately staffed. No one would accept closing the local emergency room, the local fire house, or the local police station for one day a week. Our justice system is no different. Let's join together to fight for this access. Otherwise...No courts. No justice. No freedom. ■

Wm. T. (Bill) Robinson III is president of the American Bar Association and member-in-charge of the Northern Kentucky offices of Frost Brown Todd, LLC.

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Sweeping Changes to Medical Malpractice Law— *Point/Counterpoint*

North Carolina's Tort Reform: An Overview

BY KATHERINE FLYNN HENRY AND PHILLIP JACKSON

In 2011 the General Assembly passed legislation¹ bringing about significant tort reform for North Carolina health care providers. The purpose of this article is to summarize the nature of this reform and the anticipated impact of the reform on litigation in North Carolina.

Summary of Reforms

The reform legislation was broad-ranging in that it reformed procedural rules, evidentiary rules, and substantive law. This section of the article will summarize those changes.

Changes to Procedural Rules

The reform legislation brought about four significant changes to the procedural rules related to medical malpractice actions: (1) change in limitation period for commencement of malpractice claims on behalf of minors, (2) strengthening of pre-filing expert witness review requirement, (3) presumption in favor of separate trial on liability and damages, and (4) flexibility for trial court in establishing undertaking necessary to stay execution of money judgment pending appeal.

1. Change in Limitation Period for Commencement of Malpractice Claims on Behalf of Minors

Bill - SB 33

Session Law - S.L. 2011-400, Section 9

Gen. Stat. - N.C.G.S. § 1-17(c)

Effective Date - actions arising on or after

10/1/11

Applicability - medical malpractice actions

The reform legislation reduced, in most cases, the timeframe in which a claim on behalf of a minor can be brought for malpractice. Prior to the reform legislation, a claim on behalf of the minor could be brought at any time prior to the minor attaining the age of 19. Now such a claim, in most cases,² must be made before the minor attains the age of ten, unless the limitations period contained in N.C.G.S. § 1-15(c) provides for a longer period.

2. Strengthening of Pre-filing Expert Witness Review Requirement

Bill - SB 33

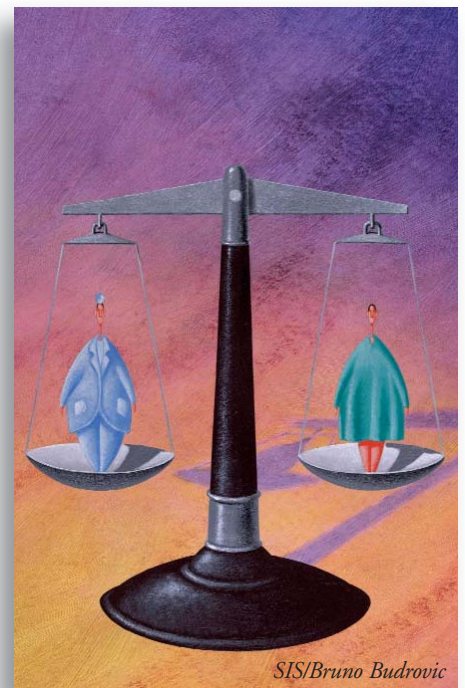
Session Law - S.L. 2011-400, Section 3

Gen. Stat. - N.C.G.S. §1-1, Rule 9(j)

Effective Date - claims filed on and after 10/1/11

Applicability - medical malpractice actions only

Prior to the reform legislation, Rule 9(j) of the Rules of Civil Procedure required that a complaint alleging medical malpractice specifically allege that the medical care had been reviewed by a person³ willing to testify that the medical care did not comply with the applicable standard of care. The court of appeals reasoned that this requirement was satisfied where the person conducting the review was only provided a verbal summary of the medical care. *Hylton v. Koontz*, 138 N.C. App. 511, 515, 530 S.E.2d 108, 111



(2000). The revised Rule 9(j) makes clear that such a cursory review is no longer sufficient. Rule 9(j) now requires that the material reviewed must include “all medical records pertaining to the alleged negligence that are available to the plaintiff after reasonable inquiry.”

3. Presumption in Favor of Separate Trial on Liability and Damages

Bill - SB 33

Session Law - S.L. 2011-400, Section 2

Gen. Stat. - N.C.G.S. §1-1, Rule 42(b)

Effective Date - claims filed on and after 10/1/11

Applicability - tort actions where plaintiff claims damages greater than \$150,000

The reform legislation amended Rule

42(b) of the Rules of Civil Procedure to create a presumption in favor of separate trials in any tort action on the issue of liability and damages where a plaintiff seeks more than \$150,000 in damages. The trial court must grant a motion for separate trials on the issue of liability and damages, unless the trial court finds “good cause” to order a single trial. If the motion is granted, the same jury will try both issues and evidence of damages will not be admissible unless and until the jury has answered the liability issue in favor of the plaintiff.

4. Flexibility in Establishing Undertaking to Stay Money Judgment Execution Pending Appeal

Bill - SB 33

Session Law - S.L. 2011-400, Section 1

Gen. Stat. - N.C.G.S. § 1-289

Effective Date - claims filed on and after 10/1/11

Applicability - any action where a money judgment is entered

The reform legislation now allows the court flexibility in establishing the amount of an undertaking necessary to stay an execution on a money judgment. N.C.G.S. § 1-289 now instructs the court to establish the undertaking at an amount that is “proper and reasonable for the security of the rights of the adverse party.” The court is to make this determination by considering the following factors: (1) amount of judgment, (2) limits of liability policies for appellant judgment debtor, and (3) aggregate net worth of the appellant judgment debtor.

Changes to Evidentiary Rules

There were three key reforms to the evidentiary rules: (1) strengthening qualification requirements for expert witnesses providing standard of care opinions about non-clinical issues, (2) strengthening qualification requirements for expert witnesses providing causation opinions, and (3) allowing more accurate evidence about medical expenses

1. Strengthening Qualification Requirements for Expert Witness Providing Standard of Care Opinions about Nonclinical Issues

Bill - SB 33

Session Law - S.L. 2011-400, Section 4

Gen. Stat. - N.C.G.S. § 8C-1, Rule 702(h)

Effective Date - claims filed on and after 10/1/11

Applicability - medical malpractice actions as defined in N.C.G.S. § 90-21.11(2)b

The reform legislation amended Rule

702(h) of the Rules of Evidence to clarify that an expert is not permitted to give testimony about the appropriate standard of care for administrative or other nonclinical issues (e.g. physician credentialing) unless the expert has substantial knowledge of the standard of care based on the expert’s training and experience.

2. Strengthening Qualification Requirements for Causation Opinions

Bill - HB 542; SB 586

Session Law - S.L. 2011-283; S.L. 2011-317

Gen. Stat. - N.C.G.S. § 8C-1, Rule 702(a)

Effective Date - actions arising on or after 10/1/11⁴

Applicability - all actions in which Rules of Evidence apply

The reform legislation amended Rule 702(a) of the Rules of Evidence to bring it in line with the Federal Rules of Evidence on expert witness testimony and the US Supreme Court’s decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786 (1993), which establishes a robust gatekeeper role for the trial court related to expert testimony. The amendment to Rule 702(a) should effectively overturn the NC Supreme Court’s decision in *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 597 S.E.2d 674 (2004), which significantly curtailed the ability of the trial court to serve as a gatekeeper related to expert testimony. If the amendment is given its full force and effect, the trial courts will now have a key role to play in deciding what expert testimony (including testimony on the issue of proximate cause) a jury is entitled to consider. Rule 702(a) now requires the trial court to make the following determinations before the expert testimony is admissible: (a) the testimony “is based upon sufficient facts or data,” (b) the testimony is “the product of reliable principles and methods,” and (c) the expert witness “has applied the principles and methods reliably to the facts of the case.”

3. Allowing More Accurate Evidence about Medical Expenses

Bill - HB 542; SB 586

Session Law - S.L. 2011-283, Sections 1.1 & 1.2; S.L. 2011-317

Gen. Stat. - N.C.G.S. § 8C-1, Rule 414; N.C.G.S. § 8-58.1

Effective Date - actions arising on or after 10/1/11⁵

Applicability - all actions in which the Rules of Evidence apply and the issue of medical expenses is relevant

The reform legislation added Rule 414 to

the Rules of Evidence. This addition, along with the amendment to N.C.G.S. § 8-58.1, will allow the jury to get one step closer to the truth regarding a plaintiff’s damages claim. Rule 414 limits the evidence that can be offered to prove past medical expenses to “the amounts actually paid to satisfy the bills” for those bills that have been paid and to “the amount actually necessary to satisfy the bills that have been incurred” but not yet paid.

Substantive Law Changes

There were four key reforms to the underlying substantive law for medical malpractice: (1) Expanded Definition of Health Care Provider (2) Expanded Definition of Medical Malpractice Action, (3) Change in Burden of Proof for Medical Care Rendered for an Emergency Medical Condition, and (4) Limit on Noneconomic Damages in Medical Malpractice Action

1. Expanded Definition of Health Care Provider

Bill - SB 33

Session Law - S.L. 2011-400, Section 5

Gen. Stat. - N.C.G.S. § 90-21.11(1)

Effective Date - actions arising on or after 10/1/11

Applicability - medical malpractice actions

The reform legislation expanded and clarified the definition of “health care provider” contained in N.C.G.S. § 90-21.11 to specifically include adult care homes licensed under Chapter 131D of the General Statutes. The revision to the definition of health care provider also made clear that there are four categories of health care providers: (a) persons licensed under Chapter 90 of the General Statutes, (b) hospitals, nursing homes, or adult care homes, (c) persons legally responsible for the negligence of any person or entity described in the first two categories, and (d) persons acting under the direction of any person or entity described in the first two categories.

2. Expanded Definition of Medical Malpractice Action to Include Claims for Negligent Credentialing & Similar Claims

Bill - SB 33

Session Law - S.L. 2011-400, Section 5

Gen. Stat. - N.C.G.S. § 90-21.11(2)

Effective Date - actions arising on or after 10/1/11

Applicability - medical malpractice actions

The reform legislation also expanded the definition of “medical malpractice action.” Prior to the amendment, “medical malprac-

tice action” was defined as:

Civil action for damages for personal injury or death arising out of the furnishing or failure to furnish professional services in the performance of medical, dental, or other health care by a health care provider.

This definition is preserved in N.C.G.S. 90-21.11(2)a. The reform legislation augments this definition by adding N.C.G.S. 90-21.112(b) which expands the definition of medical malpractice action to also include:

A civil action against a hospital, a nursing home ..., or an adult care home ..., for damages for personal injury or death, when the civil action (i) alleges a breach of administrative or corporate duties to the patient, including, but not limited to, allegations of negligent credentialing or negligent monitoring and supervision and (ii) arises from the same facts or circumstances as a claim under subdivision (a) of this subdivision.

This expanded definition of “medical malpractice action” has the effect of overturning the court of appeals decision in *Estate of Waters v. Jarman*, 144 N.C. App. 98, 547 S.E.2d 142, which held that claims based on negligent credentialing and physician oversight were “corporate negligence” claims and governed by “ordinary negligence principles.” These claims, by statutory definition, are now clearly medical malpractice actions.⁶

3. Change in Burden of Proof for Medical Care Rendered for an Emergency Medical Condition

The reform legislation amended N.C.G.S. § 90-21.12 to make two changes: (a) a medical malpractice action against a hospital, nursing home, or adult care home requires a plaintiff to prove a breach of the applicable standard of practice and (b) medical malpractice actions against health care providers treating an emergency medical condition must be established by clear and convincing evidence.

a) Standard of Health Care Applied in Medical Malpractice Actions Against Hospitals, Nursing Homes, and Adult Care Homes

Bill - SB 33

Session Law - S.L. 2011-400, Section 6

Gen. Stat. - N.C.G.S. § 90-21.12(a)

Effective Date - actions arising on or after 10/1/11

Applicability - medical malpractice actions

Negligent credentialing and similar

claims are now specifically defined as medical malpractice actions. Moreover, those claims are subject to the same proof requirements as any other medical malpractice action. N.C.G.S. 90-21.12(a) states in part:

[I]n the case of a medical malpractice action as defined in G.S. 90-21.11(2)(b), the defendant health care provider shall not be liable for the payment of damages unless the trier of fact finds by the greater weight of the evidence that the action or inaction of such health care provider was not in accordance with the standards of practice among similar health care providers situated in the same or similar communities under the same or similar circumstances at the time of the alleged act giving rise to the cause of action.

b) Clear and Convincing Evidence Standard in Medical Malpractice Actions Against Health Care Provider Treating Emergency Medical Condition

Bill - SB 33

Session Law - S.L. 2011-400, Section 6

Gen. Stat. - N.C.G.S. § 90-21.12(b)

Effective Date - actions arising on or after 10/1/11

Applicability - medical malpractice actions

The reform legislation requires a plaintiff to prove by clear and convincing evidence a violation of the standard of practice when the case involves a health care provider treating an “emergency medical condition,” which is defined by reference to 42 U.S.C. § 1395dd(e)(1)(A),⁷ a portion of a federal act known as the Emergency Medical Treatment and Active Labor Act (EMTALA). That definition of emergency medical condition is:

The term “emergency medical condition” means – a medical condition manifesting itself by acute symptoms of sufficient severity (including severe pain) such that the absence of immediate medical attention could reasonably be expected to result in –

- (i) placing the health of the individual (or, with respect to a pregnant woman, the health of the woman or her unborn child) in serious jeopardy,
- (ii) serious impairment to bodily functions, or
- (iii) serious dysfunction of any bodily organ or part

42 U.S.C. § 1395dd(e)(1)(A).

Based on this definition, the clear and convincing evidence standard should extend well beyond those situations where the

health care provider is an emergency room physician. Any medical malpractice action involving treatment of an emergency medical condition, no matter the specialty of the health care provider involved, should be subject to the clear and convincing standard.

4. Limit of \$500,000 on Noneconomic Damages

Bill - SB 33

Session Law - S.L. 2011-400, Sections 7 & 8

Gen. Stat. - N.C.G.S. §§ 90-21.19 & 90-21.19B

Effective Date - claims filed on and after 10/1/11

Applicability - medical malpractice actions

The reform legislation added N.C.G.S. § 90-21.19(a), which provides in part:

[I]n any medical malpractice action⁸ in which the plaintiff is entitled to an award of noneconomic damages, the total amount of noneconomic damages for which judgment is entered against all defendants shall not exceed five hundred thousand dollars (\$500,000). Judgment shall not be entered against any defendant for noneconomic damages in excess of five hundred thousand dollars (\$500,000) for all claims brought by all parties arising out of the same professional services.

Noneconomic damages is defined as:

Damages to compensate for pain, suffering, emotional distress, loss of consortium, inconvenience, and any other non-pecuniary compensatory damages. “Noneconomic damages” does not include punitive damages as defined in G.S. 1D-5.

N.C.G.S. § 90-21.19(c)(2).

The jury will not be informed of the limit of liability and the verdict sheet for the jury in a case involving noneconomic damages shall specify the amount of noneconomic damages awarded.

Impact on Medical Malpractice Litigation

Fewer Medical Malpractice Filings—The reform legislation is likely to result in fewer medical malpractice filings. The strengthening of the Rule 9(j) requirements should filter out many frivolous claims prior to filing. In addition, the \$500,000 limitation on noneconomic damages may result in diminished filings for certain types of medical malpractice cases. The fact that negligent credentialing and similar claims will now be subject

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to the same rigorous proof and evidentiary requirements as other malpractice claims will likely result in fewer of those types of claims being filed or, if they are filed, being resolved by a dispositive motion.

Fewer Multiple Defendant Cases—The reform legislation is likely to reduce the number of medical malpractice filings which name multiple health care providers as defendants.

Renewed Emphasis on Discovery & Dispositive Motions Regarding Proximate Cause Issues—The change to Rule 702(a) of the Rules of Evidence is likely to lead to a more vigorous challenge of the causation theories advanced by experts for both the plaintiff and defendant. Under the revision to Rule 702(a), the causation opinions offered by the expert witnesses for plaintiff and defendant will be the subject of increased scrutiny by the lawyers during the discovery process and by the trial courts during dispositive motions and at trial.

Higher Percentage of Filed Cases Being Tried—The NC Advocates for Justice recently reported that only 4% of the medical malpractice cases that have been filed and resolved since 1998 have been resolved by a jury verdict. The reform legislation is likely to result in a higher percentage of cases being resolved by jury verdict. This is so for a number of different reasons: The limitation on noneconomic damages makes it more likely that a defendant with a strong defense case will take that case to trial as the limitation on noneconomic damages removes a significant uncertainty about what a damages verdict would be in the unlikely event that the case was tried and lost. The fact that plaintiffs will be limited to presenting evidence of “actual medical” expenses will also encourage more defendants to take a strong defense case to trial. Finally, for those cases involving the treatment of emergency medical conditions, the defendant will be more likely to take a strong defense case to trial because of the clear and convincing burden of proof that will apply to such a claim.

Increase in Appellate Litigation—As with any new legislation that directly impacts litigation, there will be, in the short-term, an increase in the number of issues that are litigated in the appellate courts. The issues to be addressed and resolved by the appellate courts will likely include:

Constitutionality of Reform Legislation—

Most states that have passed similar

reform legislation have also seen that legislation challenged on various constitutional grounds including open courts, right to jury trial, equal protection, due process and separation of powers. Most state appellate courts that have addressed similar reform legislation have upheld the constitutionality of the legislation. *See* 37 No. 4 J. Health Care Fin. 46 (2011).

Application of Rule 702(a) of the Rules of Evidence—The appellate courts of North Carolina will have to address how vigorous trial courts should be in exercising their gatekeeper role with regard to expert opinion testimony.

Scope of Medical Malpractice Actions to which Clear Convincing Burden of Proof Applies—The courts will be called upon to decide the scope of what treatment qualifies as “treatment of an emergency medical condition,” and thus when the clear and convincing burden of proof applies to a medical malpractice action. ■

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on the defense of medical malpractice litigation. He is a board member of the NC Association of Defense Attorneys and also a member of the NC Bar Association Litigation Council.

Endnotes

1. There are three session laws that comprise this tort reform legislation: (a) S.L. 2011-400 (S.B. 33), (b) S.L. 2011-283 (H.B. 542), and (c) S.L. 2011-317 (S.B. 586). These three session laws will be collectively referred to in this article as the reform legislation.
2. The reform legislation made exceptions for those minors that have been adjudged to be abused or neglected, or where the minor is in the custody of the state, county, or approved child-placing agency.
3. The person conducting the review also had to possess the qualifications specified in Rule 702 of the Rules of Evidence or the plaintiff had to state that the plaintiff would seek to qualify the person under Rule 702(e) of the Rules of Evidence.
4. The effective date of this legislation is governed by S.L. 2011-317 and not by S.L. 2011-283.
5. The effective date of this legislation is governed by S.L. 2011-317 and not by S.L. 2011-283.
6. Even though the reform legislation expanded the definition of medical malpractice to include negligent credentialing and similar claims, there is no requirement that these types of claims comply with Rule 9(j). Rule 9(j) is only applicable to claims for medical malpractice as defined in N.C.G.S. § 90-21.11(2)a and not for medical malpractice actions as defined by N.C.G.S. § 90-21.11(2)b.
7. Section 6 of S.L. 2011-400 makes reference to 42 U.S.C. 1395dd(e)(1) for the definition of emergency medical condition. However, Section 4.1.(a) of S.L. 2011-283 revised that reference to 42 U.S.C. 1395dd(e)(1)(A).
8. As noted in Section I.C.3, the definition of “medical malpractice action” has been expanded to include claims against hospitals, nursing homes, and adult care homes. *See* N.C.G.S. § 90-21.11(2).

The Brave New World of Malpractice Litigation

BY BURTON CRAIGE

In 2011 the North Carolina legislature enacted sweeping changes in medical malpractice law. Effective October 1, 2011, Senate Bill 33 makes it more difficult for injured patients to pursue malpractice claims and to recover adequate damages. The new law will affect every stage of malpractice litigation, and require our courts to resolve serious constitutional questions.

Rationale for SB 33?

After months of intense debate, the

rationale for the legislation remained obscure. None of the standard justifications for “malpractice reform” fit the facts in North Carolina:

An epidemic of malpractice lawsuits? The average annual number of malpractice suits filed in North Carolina in 2007-2010 was 469 – 22%, less than in the preceding nine years (1998 – 2006).¹ Meanwhile, a 2010 report by the *New England Journal of Medicine* indicates that 4,000 patients die and 5,700 patients are permanently injured

every year in North Carolina hospitals because of preventable medical errors.²

Doctors fleeing the state? While the number of malpractice suits has declined, the number of physicians in North Carolina has steadily increased, outpacing the rate of growth in the total population. Between 1998 and 2009, the total population in North Carolina grew by 20.3%, while the physician population increased by 31.5%.³

Runaway jury verdicts? In the 12 years from 1999 through 2010, plaintiffs won only 57 malpractice trials in North Carolina, with a median jury award of only \$302,600.⁴

Skyrocketing malpractice premiums? The leading medical malpractice insurance companies in North Carolina have made record-breaking profits since 2006, and premiums paid by doctors and hospitals have been stable or declining.⁵

Malpractice suits driving up healthcare costs? There is no evidence that the legislation will lower healthcare costs. Texas—the model cited by backers of SB 33—enacted a \$250,000 cap on noneconomic damages in 2003.⁶ In the next five years, Medicare costs per enrollee increased 23% faster in Texas than in North Carolina.⁷

In the end, the facts did not matter. The new legislative leaders were determined to enact “malpractice reform.” Patients, lawyers, and judges will be forced to deal with the consequences.

Provisions of SB 33

Each provision of SB 33 was designed to favor malpractice defendants. While some of the changes were relatively uncontroversial,⁸ two provisions generated intense debate and will have a major impact on malpractice litigation: Section 6 creates a heightened burden of proof for the treatment of an “emergency medical condition” and Section 7 imposes a \$500,000 cap on “noneconomic” damages.

Heightened Burden of Proof for “Emergency Medical Conditions”

SB 33 adds the following subsection to G.S. § 90-21.12:

(b) In any medical malpractice action arising out of the furnishing or the failure to furnish professional services in the treatment of an emergency medical condition, as the term “emergency medical condition” is defined in 42 U.S.C. §

1395dd(e)(1)(A),⁹ the claimant must prove a violation of the standards of practice set forth in subsection (a) of this section by clear and convincing evidence.

Under the new statute, the “clear and convincing” burden of proof applies only to “a violation of the standards of practice.” The burden of proof for causation and damages remains the preponderance of the evidence.

The referenced federal statute defines “emergency medical condition” as follows:

(1) The term “emergency medical condition” means —

(A) a medical condition manifesting itself by acute symptoms of sufficient severity (including severe pain) such that the absence of immediate medical attention could reasonably be expected to result in—

(i) placing the health of the individual (or, with respect to a pregnant woman, the health of the woman or her unborn child) in serious jeopardy,

(ii) serious impairment to bodily functions, or

(iii) serious dysfunction of any bodily organ or part.

In *Diaz v. Div. of Soc. Servs.*, 360 N.C. 384, 387-88 (2006), the North Carolina Supreme Court interpreted the identical definition in a federal Medicaid statute:

[W]hen determining whether a condition is an emergency medical condition, the key words are “emergency,” “acute,” “manifest,” and “immediate.” ... “[T]he statutory language unambiguously conveys the meaning that emergency medical conditions are sudden, severe, and short-lived physical injuries or illnesses that require immediate treatment to prevent further harm.” ... The word “immediate” is commonly defined as: “occurring, acting, or accomplished without loss of time; made or done at once: INSTANT.” *Webster’s Third New International Dictionary* 1129 (16th ed. 1971).

Following *Diaz*, our courts must confine the heightened burden of proof to those rare emergency situations in which “instant” action was required to prevent serious harm.

Cap on Noneconomic Damages

For medical malpractice actions filed on or after October 1, 2011, SB 33 places a \$500,000 cap on noneconomic damages, defined as “[d]amages to compensate for pain, suffering, emotional distress, loss of

consortium, inconvenience, and any other nonpecuniary compensatory damage.” G.S. 90-21.19(c)(2). The cap does not encompass punitive damages. *Id.* The \$500,000 limit applies regardless of the number of defendants or the number of plaintiffs. G.S. 90-21.19(a).

The jury may not be informed about the cap. G.S. 90-21.19(d). The verdict form will separately itemize noneconomic damages. G.S. 90-21.19B. If the jury awards more than \$500,000 in noneconomic damages, the judge shall modify the judgment to conform to the cap. G.S. 90-21.19.

Exception to the Cap

Subsection (b) of G.S. 90-21.19 creates an exception to the cap “if the trier of fact finds *both* of the following: (1) The plaintiff suffered disfigurement, loss of use of part of the body, permanent injury or death; and (2) The defendant’s acts or failures, which are the proximate cause of the plaintiff’s injuries, were *committed in reckless disregard of the rights of others, grossly negligent, fraudulent, intentional or with malice.*”

To recover full compensation, catastrophically injured patients must prove that the defendant was “grossly negligent” or acted with “reckless disregard” of the patient’s rights. Under North Carolina law, “the terms ‘willful and wanton conduct’ and ‘gross negligence’ [are used] interchangeably to describe conduct that falls somewhere between ordinary negligence and intentional conduct.” *Yancey v. Lea*, 354 N.C. 48, 52 (2001) (Lake, C.J.). “An act or conduct rises to the level of gross negligence when the act is done purposely and with knowledge that such act is a breach of duty to others, i.e., a *conscious* disregard of the safety of others.” *Id.* at 53 (emphasis in original).

The Supreme Court views “reckless disregard” as marginally less culpable than other forms of quasi-intentional misconduct. An act is “wanton” when it is “done of wicked purpose or when done needlessly, manifesting a *reckless indifference to the rights of others.*” *Id.* at 52 (emphasis added).

Few cases will fit within the exception. If the health care provider knowingly and needlessly placed the patient at risk of serious harm, or the negligent doctor was incapacitated by alcohol or drugs, the exception may apply. If the jury finds the evidence sufficient to support punitive damages, the cap will not limit the award of compensatory damages.

Constitutionality of the Cap

Two weeks after SB 33 was introduced, former Chief Justice I. Beverly Lake Jr. released a letter expressing his view that the cap violates the right to trial by jury, guaranteed by Article I, Section 25 of the North Carolina Constitution. In his letter, Chief Justice Lake clearly presents the constitutional challenge:

For over 200 years, the North Carolina Constitution has provided that, in “all controversies at law respecting property, the ancient mode of trial by jury is one of the best securities of the rights of the people, and shall remain sacred and inviolable.” N.C. Const., art. I, § 25. The North Carolina Supreme Court has long recognized that compensatory damages, including damages for “mental and physical pain,” is a form of “property” protected by the constitutional right to trial by jury.

In *Osborn v. Leach*, 135 N.C. 628, 47 S.E. 811 (1904), ... the Court stated: “The right to have punitive damages assessed is . . . not property. The right to recover actual or compensatory damages is *property*.” ... The Court elaborated:

The plaintiff is entitled to recover compensation for mental and physical pain and injury to reputation. These are actual damages, and these are *property*. ‘The right to recover damages for an injury is a species of property and vests in the injured party immediately on the commission of the wrong. . . . Being property, it is protected by the ordinary constitutional guarantees.’ . . . It cannot be *extinguished* except by act of the parties or by operation of the statute of limitation.

When I served as chief justice, a unanimous Court expressly reaffirmed this principle in *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 594 S.E.2d 1 (2004). . . .

The clear import of *Osborn* and *Rhyne* is that Section 3 [now Section 7] of SB 33 is unconstitutional. North Carolina citizens have a “sacred and inviolable” right to have a jury determine the amount of compensatory damages, including noneconomic damages, under our Constitution. The right to have a jury make that decision cannot be eliminated or restricted by the General Assembly.

Former Justice Edward Thomas Brady submitted a letter supporting Chief Justice

Lake’s analysis. Justice Brady’s letter commands particular attention because he authored the unanimous 2004 Supreme Court opinion in *Rhyne v. K-Mart*. The *Rhyne* court explicitly recognized that a jury’s award of compensatory damages is a vested property right, protected by the North Carolina Constitution.

Acknowledging the vulnerability of the cap, the sponsors of SB 33 included a severance clause (Section 10) that preserves the remainder of the act if the cap is declared unconstitutional.

Retroactive Application of the Cap

The cap on noneconomic damages is constitutionally infirm, regardless of its effective date. The legislature compounded its constitutional problem by applying the cap to all actions “commenced” on or after October 1, 2011, instead of all cases “arising” on or after the effective date. This retroactive denial of vested property rights further violates the North Carolina Constitution.

A patient has a vested property right to compensatory damages the moment she is injured by a health care provider’s negligence. The Supreme Court in *Osborn* spoke clearly and unequivocally: “The right to recover damages for an injury is a species of property and vests in the injured party immediately on the commission of the wrong.” *Osborn v. Leach*, 135 N.C. at 633. That right is substantive, and cannot be abridged by subsequent legislative enactment.

Article IV, Section 13(2) of our Constitution provides that, “No rule of procedure or practice shall abridge substantive rights or abrogate or limit the right of trial by jury.” The constitutional command is doubly compelling when the procedural rule is applied retroactively. *Gardner v. Gardner*, 300 N.C. 715, 718-19 (1980).

In a letter to legislators defending the constitutionality of the cap, former Chief Justice Mitchell acknowledged that the cap could not be applied to actions arising before the effective date of the act: “If a person has been injured and has become entitled to damages at the time a statute such as that contemplated by Senate Bill 33 is enacted, the legislation could not strip that *vested* property right from the injured party.” (Emphasis in original.) In Mitchell’s view, the cap would be constitutional if applied “only to injuries arising after it is enacted.” *Id.*

Courts in other states have held that the retroactive application of a statutory cap on damages is unconstitutional. *See, e.g., Prince George’s County v. Longtin*, 19 A.3d 859, 880-83 (Md. 2011); *Estate of Bell v. Shelby County Health Care*, 318 S.W.3d 823, 829-33 (Tenn. 2010); *Klotz v. St. Anthony’s Medical Center*, 311 S.W.3d 752, 759-60 (Mo. 2010); *Martin by Sceptur v. Richards*, 531 N.W. 2d 70, 89-92 (Wis. 1995).

Conclusion

Senate Bill 33 harms all victims of medical malpractice, especially those with catastrophic injuries. Fortunately, the legislature does not have the final word. When the North Carolina courts are asked to fulfill their duty to enforce the rights guaranteed by our Constitution, the cap on noneconomic damages will not stand. ■

Burton Craige, a partner with Patterson Harkavy LLP in Raleigh, serves as legal affairs counsel for the North Carolina Advocates for Justice.

Endnotes

1. North Carolina Advocates for Justice, *Medical Malpractice Lawsuits in North Carolina, 1998 – 2010* (July 2011) (Table 1) (data from NC Administrative Office of the Courts) (“Malpractice Lawsuits in North Carolina”).
2. Landrigan, *Temporal Trends in Rates of Patient Harm Resulting from Medical Care*, N Engl J Med 2010; 363: 2124-34; Bryan and Craige, *Harmed in the Hospital*, Raleigh News & Observer (January 20, 2011).
3. *Malpractice Lawsuits in North Carolina* (Table 2) (data from NC Health Professions Data System, Cecil G. Sheps Center for Health Services Research, UNC-Chapel Hill).
4. *Malpractice Lawsuits in North Carolina* (Table 3) (data from NC Administrative Office of the Courts and superior court case files).
5. MAG Mutual Insurance Company, *\$16.5 Million Record Dividend Announced* (May 2011); Pinnacle Actuarial Resources, Report on Medical Mutual Insurance Company of North Carolina (February 21, 2011).
6. Tex. Civ. Prac. & Rem. Code § 74.301.
7. Kaiser Family Foundation (2003, 2004); Dartmouth Atlas of Health Care (2006, 2007); *see* North Carolina Advocates for Justice, *Texas Spin #1* (March 2, 2011).
8. E.g. greater appeal bond flexibility (Section 1); bifurcation of liability and damages when damages sought exceed \$150,000 (Section 2); Rule 9(j) expert review must include all medical records pertaining to the alleged negligence (Section 3); shorter statute of limitations for minors (Section 9).
9. In the “tort reform” statute, HB 542, the legislature amended SB 33 to preserve the traditional burden of proof for women in active labor, except as provided in subsection A. HB 542, Section 4.1(a) (June 17, 2011).

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Historical Fiction

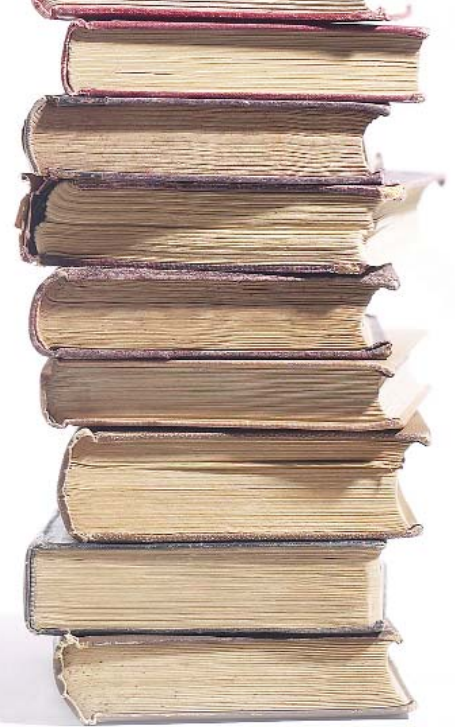
Romance

International Espionage

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Science Fiction

Ninth Annual Fiction Writing Competition



The Publications Committee of the *Journal* is pleased to announce that it will sponsor the Ninth Annual Fiction Writing Competition in accordance with the rules set forth below. The purposes of the competition are to enhance interest in the *Journal*, to encourage writing excellence by members of the bar, and to provide an innovative vehicle for the illustration of the life and work of lawyers. If you have any questions about the contest, please contact Jennifer Duncan, Director of Communications, North Carolina State Bar, 6568 Towles Rd., Wilmington, NC, 28409; ncbar@bellsouth.net; 910.397-0353.

Rules for Annual Fiction Writing Competition

The following rules will govern the writing competition sponsored by the Publications Committee of the *Journal*:

1. The competition is open to any member in good standing of the North Carolina State Bar, except current members of the Publications Committee. Authors may collaborate, but only one submission from each member will be considered.

2. Subject to the following criteria, *the story may be on any fictional topic and may be in any form* (humorous, anecdotal, mystery, science fiction, etc.—*the subject matter need not be law related*). Among the criteria the committee will consider in judging the articles submitted are: quality of writing; creativity; extent to which the article comports with the established reputation of the *Journal*; and adherence to specified limitations on length and other competition requirements. The committee will not consider any article that, in the sole judgment of the committee, contains matter that is libelous or violates accepted community standards of good taste and decency.

3. All articles submitted to the competition become property of the North Carolina State Bar and, by submitting the article, the author warrants that all persons and events contained in the article are fictitious, that any similarity to actual persons or events is purely coincidental, and that the article has not been previously published.

4. *Articles should not be more than 5,000 words in length* and should be submitted in an electronic format as either a text document or a Microsoft Word document.

5. Articles will be judged without knowledge of the identity of the author's name. Each submission should include the author's State Bar ID number, placed only on a separate cover sheet along with the name of the story.

6. All submissions must be received in proper form prior to the close of business on June 1, 2012. Submissions received after that date and time will not be considered. Please direct all submissions to: Fiction Writing Competition, Jennifer Duncan, 6568 Towles Rd., Wilmington, NC, 28409; ncbar@bellsouth.net.

7. Depending on the number of submissions, the Publications Committee may elect to solicit outside assistance in reviewing the articles. The final decision, however, will be made by majority vote of the committee. Contestants will be advised of the results of the competition. Honorable mentions may be announced.

8. The winning article, if any, will be published. The committee reserves the right to edit articles and to select no winner and to publish no article from among those submitted if the submissions are deemed by the committee not to be of notable quality.

Deadline is June 1, 2012

The Quest for Equal Access to Justice in North Carolina

BY CELESTE HARRIS

Consider that only 10% of North

Carolina attorneys provide *pro bono* legal services each year and you can imagine the impact our profession would have on the fight for equal justice if 100% of attorneys are providing some form of *pro bono* legal service.



There are approximately 21,500 licensed attorneys in North Carolina, of which at least 15,000 are members of the North Carolina Bar Association.¹ Attorneys who signed up to provide direct, free legal services to qualified low-income North Carolina residents through the private attorney involvement (PAI) program offered by Legal Aid of North Carolina, Inc. (LANC) in 2011 numbered 2,565. The actual number of attorneys who provided direct service was 914.

According to *American Lawyer's* 2010 *pro bono* rankings, the nationwide average *pro bono* hours for lawyers at the 200 largest firms plummeted 8% in 2010 to their low-

est level in three years, reversing a decade of steady growth. The overall average percentage of lawyers who did more than 20 hours of *pro bono* work annually dropped 5.2%.

Across the country and at every governmental level, funding for programs that serve the poor and which provide a basic economic safety net is being slashed with devastating consequences for those who survive at or below the poverty line. These individuals, families, and children need legal advocates and the services that Legal Aid provides now more than ever.

To put the need into perspective, the 2011 poverty guidelines establish poverty for a family of four at annual income of \$22,350 or less.² Obviously, these individuals are unable to afford the services of an

attorney, yet their need for legal assistance is oftentimes critical.

A little history here will provide insight into how and why the government became involved in the funding of legal services for the poor and the subsequent formation of Legal Aid of North Carolina, Inc.

The first legal aid society in the United States emerged in New York in 1876, when the city's German Society created the Deutscher Rechtsschutz-Verein—or German Legal Protection Society—to provide legal counsel to the wave of German immigrants arriving in the United States during the late nineteenth century. One part-time attorney was hired to help protect his clients from exploitation from “the rapacity of runners, boarding-house keepers, and miscellaneous coterie of sharpers”—translated as unscrupulous employers, landlords, and shopkeepers—“who found that the trustful and bewildered newcomers offered an easy prey.”³

In 1919 the concept of free legal assistance for the poor was promoted in Reginald Heber Smith's publication *Justice and the Poor*. Smith challenged the legal profession to consider it an obligation to see to it that access to justice was available to all, without regard to ability to pay. “Without equal access to the law,” he wrote, “the system not only robs the poor of their only protection, but it also places in the hands of their oppressors the most powerful and ruthless weapon ever invented.”

Congress passed the Economic Opportunity Act of 1964 to “mobilize the human and financial resources of the nation to combat poverty in the United States,” by providing federal funding for civil legal assistance for low-income people. Funds were granted through the Office of Economic Development to local legal aid offices throughout the country to fight the War on Poverty. As its designers had intended, major changes occurred for the legal circumstances of low-income Americans. Major Supreme Court and appellate court decisions in cases brought by legal services attorneys recognized the constitutional rights of the poor and interpreted statutes to protect their interests in the areas of government benefits, consumer law, landlord-tenant law, and access to health care, among others. Advocacy before administrative agencies assured effective implementation of state and federal laws and stimulated regulations and policies that helped shape programs that

affected the poor. Advocacy before legislative bodies helped the poor redress grievances that were otherwise not addressed by the courts. Equally important, representation before lower courts and administrative bodies helped individual poor clients enforce their legal rights and take advantage of opportunities to improve their employment, income support, education, housing, and working and living conditions.⁴

In response, Congress and members of the Office of Economic Development undertook to limit the activities of legal service programs. These efforts and the continuous political interference in the operation of local programs led to the idea within the organized bar, the Nixon administration, Congress, and the legal services community of an independent Legal Services Corporation. President Nixon introduced his version of legislation setting up such a corporation as a new direction to make legal services “immune to political pressures...and a permanent part of our system of justice.” A few months later, on July 25, 1974, The Legal Services Corporation Act was enacted and signed into law.⁵ The government has shown its commitment to “equal justice under the law” by funding the Legal Services Corporation every year since, financing poverty law offices across the country, and employing thousands of poverty lawyers to provide free legal services to the nation's poorest citizens. Unfortunately, the funding allocated for legal services has been shrinking over the decades while the population needing civil legal services continues to grow. It is now critical that local bar associations and big business take on more responsibility for providing legal services in local communities.

The value of legal aid to poor individual citizens is apparent and well recognized, but its value spreads throughout communities encompassing big business. In his research for his book, *Rationing Justice, Poverty Lawyers, and Poor People in the Deep South*, Kris Shepard writes that when work for the Deutscher Rechtsschutz-Verein subsided due to declining German immigration, the president of the group, Arthur von Briesen, sought to expand his client base and sources of funding. Capitalizing on the growing fears of the business elite about mass social unrest as a depression blanketed the middle years of the 19th century, Von Briesen advocated that legal aid eased unrest among the

The 2011 Poverty Guidelines for the 48 Contiguous States and the District of Columbia

Persons in family	Poverty guideline
1	\$10,890
2	14,710
3	18,530
4	22,350
5	26,170
6	29,990
7	33,810
8	37,630

For families with more than 8 persons, add \$3,820 for each additional person.

less affluent. “It keeps the poor satisfied because it establishes and protects their rights,” and “it is the best argument against the socialist who cries that the poor have no rights, which the rich are bound to respect.”⁶ His appeal was successful and with the support of the city's wealthy philanthropists, the New York Legal Aid Society was established. By 1910 legal aid societies existed in most of the larger cities of the East, and before World War I they emerged in the Midwest, Pacific Coast, Southwest, and slowly in the South. Emphasis of the legal services were domestic disputes; wage claims; contract, debt, and other financial claims; landlord tenant disputes; protection against loan sharks; and conflicts over personal property. Even today, although for a different reason, major clients ask large firms for information on the *pro bono* work they do as part of retention decision making. Most businesses want to know that there will be legal help for their employees who are in troublesome domestic, consumer, or housing situations, and they want to know that the attorneys they hire are doing their part.

Congress is appropriating \$348 million for Legal Services Corporation (LSC) in 2012.⁷ This is 14.8% less than the amount appropriated in 2010. Although LSC is the largest funding source of Legal Aid of North Carolina, other funding sources include state and local governments, the Interest on Lawyer Trust Account (IOLTA) program, foundations, attorney fees, and private attor-

Medical Record Review for Attorneys—Offered by Mitzi C. Pestaner, RN, JD, LL.M. Member of the North Carolina Bar. Criminal or civil cases. Call 919-799-8916.

ney resources. Unfortunately, the state's dedicated funding for legal services has been cut 33% and IOLTA funding has been cut 30% over the last two years.

Our profession must be reminded of then US Attorney General Robert F. Kennedy's admonition during a Law Day address at the University of Chicago in the spring of 1964. Kennedy castigated his profession and admonished them to accept the responsibility for permitting the growth and continuance of two systems of law—one for the rich and one for the poor. He recognized that a “wealthy client can pay counsel to unravel—or to create—a complex angle” of legal questions, but less affluent persons did not have that luxury.⁸

As chair of the Board of Directors of Legal Aid of North Carolina (LANC), I encourage your participation in sharing your financial resources, legal knowledge, and skills with your neighbors. We can help fill the gap in funding left by federal budget cuts and decreasing state resources. Once a year attorneys are given the opportunity to participate in the Equal Access to Justice (EAJ) campaign. The EAJ campaign runs from November through March. Support equal justice for all by making your financial contribution to Legal Aid of North Carolina. Your response to the letters or emails you have received will make a difference in the ability of LANC to keep offices open and staffed so there will be minimal or, at best, no reduction in the services it provides.⁹ A law school professor from my alma mater recently wrote, “A life in the law is a call to leadership in the service of others.” We are fortunate to be able to help our communities in ways that no other group can. Now is the time for the profession to step up and meet the challenge of assuring access to justice for all.

Legal Services Corporation requires that a grantee organization spend 12.5% of its funding on the provision of *pro bono* legal services by private attorneys. By adding this requirement for funding, Congress clearly envisioned that local attorneys would con-

tinue to provide legal services for the poor in their communities. Funding of legal services was never intended to be sufficient to meet the total demand for legal services by people of modest means who are unable to afford the assistance of a lawyer. I see the Legal Aid office as a conduit through which efficient and effective legal services flow; not as the sole source of legal service for the poor. In 1964 there was roughly one legal aid attorney for every 120,000 potential clients compared to one private attorney for every 560 paying clients.¹⁰ Although funding for legal aid has assured the availability of lawyers for those in our communities with low incomes, the disparity remains. The North Carolina Equal Access to Justice Commission estimates that there is one legal aid attorney for every 19,162 potential low-income clients and one private attorney for every 554 North Carolinians.¹¹ As a group we can narrow the gap of inequality even further.

In addition to our personal, moral, and ethical desire to give back to the community, the North Carolina Rules of Professional Conduct provide that “every lawyer has a professional responsibility to provide legal services to those unable to pay” and “should aspire to render at least 50 hours of *pro bono publico* legal services per year.” The first step to reaching this goal is to contact your local Legal Aid office. Since the closing of the Asheville, Boone, Henderson, and Smithfield offices, there are now 21 regional legal aid offices that need your help. Despite staff reductions in the remaining offices, the number of eligible clients served has not decreased. Legal aid attorneys and their staff are working harder than ever to assure justice for all—and we can help.

Martin H. Brinkley, president of the North Carolina Bar Association, has spoken and written about his passion for civil justice. Under Mr. Brinkley's leadership, the NCBA has associated with LANC to sign up 500 attorneys for his inaugural program, Call4All. By November 2011, 250 lawyers had signed up to provide short phone advice to one or two pre-screened clients a month. According to LANC Executive Director George Hausen, LANC was able to assist more than 650 additional clients as a result of volunteer participation. Take up President Brinkley's cause by signing up for a case through our local legal aid office or register to provide brief phone service through

call4allnc.org. Who will be the 500 to set the example for the country to follow? ■

Celeste Harris is a member of Maynard & Harris, Attorneys at Law, PLLC, in Winston-Salem. She graduated from the University of Missouri - Columbia with a BS in nursing in 1983 and worked for the Veterans Administration before attending law school at St. Louis University. She completed her final year of law school at Wake Forest University in 1991. Since 1991 she has been representing injured and disabled workers in private practice, adding representation of Social Security disability claimants and mediation to her practice in 2005. Ms. Harris is active in pro bono activities, earning the Volunteer Attorney of the Year award in 2010 from the Forsyth County office of Legal Aid of North Carolina.

Endnotes

1. lawschooltuitionbubble.wordpress.com/original-research-updated/lawyers-per-capita-by-state/. According to this blog, North Carolina ranks 27th in attorneys per capita. The research shows that of the 20,226 active and resident attorneys in North Carolina, 14,310 attorneys are employed and 4,656 attorneys are not employed in the profession. Also, the October 2011 data obtained from the State Bar for the current Access to Justice Campaign listed 21,447 active attorneys, including judges and attorneys serving in the military.
2. Section 673(2) of the Omnibus Budget Reconciliation Act (OBRA) of 1981 (42 U.S.C. 9902(2)) requires the secretary of the Department of Health and Human Services to update the poverty guidelines at least annually, adjusting them on the basis of the Consumer Price Index for All Urban Consumers (CPI-U). The poverty guidelines are used as an eligibility criterion by the Community Services Block Grant program and a number of other federal programs. The poverty guidelines issued here are a simplified version of the poverty thresholds that the Census Bureau uses to prepare its estimates of the number of individuals and families in poverty.
3. Kris Shepard, *Rationing Justice, Poverty Lawyers, and the Poor People in the Deep South*, p. 2 (2007).
4. National Legal Aid and Defender Association, nlada.org/About/About_HistoryCivil.
5. As an independent corporation created by Congress and charged with distributing government funds, LSC is governed by federal law. Federal law also applies to recipients of LSC grant funds. The LSC Act, LSC Appropriations Statutes, and LSC Regulations provide guidance on the operation and responsibilities of LSC and its grantees.
6. Shepard, *supra* note iii, at 3.
7. lsc.gov/local-programs/program-profiles.
8. Shepard, *supra* note iii, at 2.
9. Online contributions can be made at legalaiddnc.org.
10. Shepard, *supra* note iii, at 3.
11. North Carolina Access to Justice Commission, nccqualaccesstojustice.com.



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FOR THE ISSUES OF LIFE IN LAW

The Impact of *Gideon* on Justice in North Carolina—50 Years of Progress

BY THOMAS K. MAHER

“The COURT: Mr. Gideon, I am sorry, but I cannot appoint counsel to represent you in this case. Under the laws of the state of Florida, the only time the court can appoint counsel to represent a defendant is when that person is charged with a capital offense. I am sorry, but I will have to deny your request to appoint counsel to defend you in this case.

“The DEFENDANT: The United States Supreme Court says I am entitled to be represented by counsel.”

* * * * *

MR. MENTZ: Mr. Chief Justice, may it please the Court, in company with Florida, Alabama and North Carolina are of the opinion that *Betts v. Brady* should not be overruled...We contend that the Sixth Amendment providing for representation by counsel in criminal prosecutions operates only on the federal government; that state appointment of counsel, in and of itself, is not an essential to a fair trial. *Oral Argument of George D. Mentz, assistant attorney general of Alabama.*

* * * * *

[I]n our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth. *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

Gideon v. Wainwright, 372 U.S. 335 (1963) is one of the best known decisions of the United States Supreme Court. *Gideon* not

only solidified the importance of counsel in criminal cases, but is also one of the rare cases to be immortalized in a book and a movie. It helps that the back story is as interesting as the opinion is important; Clarence Gideon asked for counsel to represent him in the Florida trial court, proceeded on his own to take his case to the United States Supreme Court, won a landmark ruling granting indigent defendants the right to counsel, and was then acquitted at trial when represented by counsel. As *Gideon* approaches its 50th anniversary, it is worth taking a look at the impact of the decision on the quality of justice in North Carolina.

North Carolina before *Gideon*

As director of North Carolina's Office of Indigent Defense Services for the past three years, I have begun taking for granted many of the strengths of our system for providing indigent defense services, and the quality of justice in North Carolina in general. While there are serious problems, from an inadequate budget to cases marred by a poorly run crime lab, there is much to be said for criminal justice in North Carolina. Indigent defendants, particularly those facing capital trials or other serious charges, have access to good lawyers, investigators, and experts, and all criminal defendants have a right to fair pre-trial discovery. In comparison to many other jurisdictions, North Carolina serves as a model for providing justice to those charged with crimes, regardless of their lack of wealth. The irony of this is that North Carolina had a poor history of providing counsel prior to *Gideon*, and was one of only two states to join Florida in arguing that there should be no absolute right to the

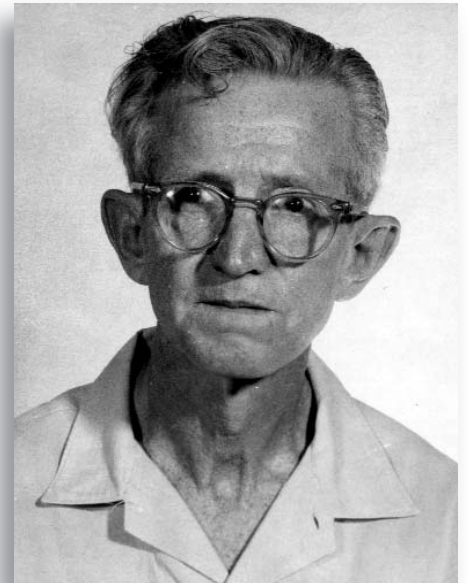


Photo courtesy State Archives of Florida

appointment of counsel for indigent defendants facing felony charges. If North Carolina's view had carried the day, *Gideon* would have languished in prison rather than being exonerated with the assistance of competent counsel.

Prior to *Gideon*, North Carolina did not provide appointed counsel to all indigent defendants facing even felony charges. Rather, for non-capital cases, the decision to appoint counsel for indigent defendants was discretionary. For example, in *State v. Hedgepeth*, 228 N.C. 259 (1947), the defendant was a 24-year-old tenant farmer with a third grade education, described by his father as "not of average mentality," who was charged with robbery. Hedgepeth was arrested on December 28, 1946, and went to trial, unrepresented by counsel, on January 6, 1947.

Hedgepeth was convicted and sentenced to prison. On appeal from denial of a motion for a new trial, the North Carolina Supreme Court held that Hedgepeth was not entitled to appointed counsel. Although Article I, Section 11 of the North Carolina Constitution in effect at the time provided that "[i]n all criminal prosecutions every man has the right to be informed of the accusation against him and to confront the accusers and witnesses with other testimony, and to have counsel for his defense, and not be compelled to give evidence against himself, or to pay costs, jail fees, or necessary witness fees of the defense, unless found guilty," and N.C. G. S., 15-4 provided: "Every person accused of any crime whatsoever, shall be entitled to counsel in all matters which may be necessary for his defense," the Court held that in non-capital cases the appointment of counsel was discretionary.

North Carolina's position was supported, at least in theory, by the Supreme Court's decision in *Betts v. Brady*, 316 U.S. 455 (1942). *Betts'* story was much the same as *Gideon's*; charged with a felony, *Betts* requested

appointed counsel, which was denied. Following his conviction and incarceration, *Betts* obtained review by the United States Supreme Court. While the right to the appointment of counsel in federal court was established in *Johnson v. Zerbst*, 304 U.S. 458 (1938); and in state court in capital cases, at least when appointment was necessary to a fair trial, had been established in *Powell v. Alabama*, 287 U.S. 45, 71 (1932), ("in a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel"); when *Betts* was decided, there was no precedent requiring state courts to appoint counsel for all indigent defendants charged with a felony. As observed in *Betts*, there were 35 states that provided for the automatic appointment of counsel in serious non-capital cases, but North Carolina was one of the remaining states in which there was no blanket right to appointed counsel. In *Betts* the Supreme Court rejected the argument that the constitution required appointment of

counsel in all felony cases in which the defendant could not afford to hire counsel.

As we have said, the Fourteenth Amendment prohibits the conviction and incarceration of one whose trial is offensive to the common and fundamental ideas of fairness and right, and while want of counsel in a particular case may result in a conviction lacking in such fundamental fairness, we cannot say that the amendment embodies an inexorable command that no trial for any offense, or in any court, can be fairly conducted and justice accorded a defendant who is not represented by counsel. 316 U.S. 45, 473.

Until forced to recognize a blanket right to counsel by *Gideon*, North Carolina continued to affirm convictions obtained without a lawyer. The results were predictably disastrous for indigent defendants. An example of the fallout from the refusal to appoint counsel is the trial that led to the decision in *Hudson v. North Carolina*, 363 U.S. 697 (1960). *Hudson* was charged, along with two co-defendants, with robbery. One of the co-defendants—Cain—appeared for trial repre-

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sented by counsel. Hudson and the remaining co-defendant were unrepresented. Hudson, aged 18, requested that the trial court appoint counsel. The court refused, stating that, “[t]he court will try to see that your rights are protected throughout the case.” The trial began with the testimony of the alleged victim. During the victim’s testimony, Cain’s attorney offered to represent all three defendants as long as their interests did not conflict. During the cross-examination of witness, the court indicated that counsel should cross-examine the witness on behalf of only Cain, as there appeared to be a conflict of interest. At the close of the state’s case, and in the presence of the jury, Cain’s attorney tendered a guilty plea for Cain to larceny, which was accepted. Hudson and his co-defendant were then convicted by the jury and sentenced to prison. As was the case for many defendants who had no lawyer at trial, Hudson was also unrepresented on appeal, and his appeal was dismissed for lack of prosecution.

Oddly, although North Carolina did not provide for the automatic appointment of counsel at a felony trial, the North Carolina Post-Conviction Hearing Act did provide for the appointment of counsel upon request of an indigent petitioner. Hudson was represented by counsel for his post-conviction hearing, but the trial court found no special circumstances requiring counsel for the trial, and affirmed the conviction. The United States Supreme Court reversed, finding that the mid-trial plea by Cain in the presence of the jury “made this a case where the denial of counsel’s assistance operated to deprive the defendant of the due process of law guaranteed by the Fourteenth Amendment. The prejudicial position in which the petitioner found himself when his codefendant pleaded guilty before the jury raised problems requiring professional knowledge and experience beyond a layman’s ken.” 363 U.S. 697, 703-04. The Court did not discuss the problems with a system in which a decision to appoint counsel is made at the start of the trial, and then found to be in error due to events that occurred during the trial, or suggest that this problem could only be solved by recognizing a right to the appointment of counsel that did not depend upon the discretion of judges.

Gideon and Its Aftermath in North Carolina

When the United States Supreme Court granted *certiorari* in a case that was then titled

Gideon v. Cochran, later amended to *Wainwright*, the attorney general of Florida informed the attorneys general of all of the states of the case and invited their participation as *amici curiae*. The result was the filing of an *amicus* brief by 22 states urging that the Supreme Court reject Florida’s position. As articulated in the introductory statement regarding the interest of these *amici curiae*:

The undersigned attorneys general, representing states with a wide range of historical traditions and sharp variances in their criminal procedures, join in this brief *amicus curiae* in furtherance of a commonly held objective. That objective is to insure that every indigent person accused of any felony in a state court is guaranteed right to counsel. That right, as we shall demonstrate, is indispensable to the idea of justice under law. An essential assumption of our Constitution, it transcends the power of the states to determine their own criminal procedures. Its denial in Florida, or in any other state, is ultimately of grave concern to all states throughout the nation. If its denial has up to this juncture been sanctioned by this Court’s holding in *Betts v. Brady*, 316 U.S. 455, then we urge that that holding be reconsidered.

North Carolina was not one of these 22 states. North Carolina was the only state to join Alabama in a brief filed in support of Florida’s position. The brief was filed by the attorney general of Alabama, authored by Assistant Attorney General George Mentz, and was explicitly adopted by the Attorney General T. W. Bruton and Assistant Attorney General Ralph Moody, state of North Carolina.

The *amicus* brief is worth reading in its entirety, but can be summed up as resting on the argument that the federal government—and United States Constitution—should not dictate to the states obligations to the indigent.

Admittedly, on that distant day when finally the millenium is reached, no layman shall be compelled to defend himself without legal assistance in a state criminal prosecution. No indigent individual shall be compelled to suffer illness or injury without the attention of a physician or benefit of necessary medicine or hospital care. No poor person shall be compelled to suffer the pangs of hunger or the discomforts occasioned by a lack of adequate clothing, suitable housing, or other crea-

ture comforts, humanitarian principles require that such assistance be given to the needy even today, but it cannot be argued logically that, under the due process or equal protection clauses of the Fourteenth Amendment, the states must furnish them. If and when, in the considered judgment of the people of the individual states, such gratuitous services or aid are warranted morally or are feasible financially, they will be provided. Though man’s social evolution is slow, history proves that he does advance in all fields. To be lasting, however, his progress must result from his own volition rather than come from judicial fiat.

* * * * *

The people of our United States have long favored a free enterprise system under which they take care of themselves. They have sought to avoid socialism which, as we understand it, is a state of affairs in which the government takes care of the people. A graphic illustration of this occurred on July 17, 1962, when, for the second time in two years, the United States Senate, a deliberative body which is responsive to the will of the people, defeated a medical aid bill which was designed primarily for the benefit of some 17,000,000 citizens over 65 years of age who reportedly are in dire need of medical treatment and cannot get it because they cannot afford it. The same bill bogged down in the Ways and Means Committee and never reached the floor of the House of Representatives for a vote.

Because of the inherent disparity in ability among people, our free enterprise system has always produced two classes of people—those who have and those who have not. No one questions the desirability of having furnished to those who are economically underprivileged many of the things which are available only to our more prosperous citizens. Yet it cannot be argued logically that a state’s failure to provide such things is a violation of the due process clause of the Fourteenth Amendment. Why, then, single out a state’s failure to furnish counsel for a poor person charged with a non-capital crime and hold that it is repugnant to due process?

It should come as no surprise that Mentz’s argument before the Supreme Court was an

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uphill battle. Mentz recognized in his brief that there had been a steady stream of convictions reversed for failing to appoint counsel in states in which the decision to appoint counsel was left to the discretion of the trial judge. During oral argument, Mentz was questioned about whether maintaining *Betts* made sense:

THE COURT: Supposing you had the choice, as you see it, representing a state, of maintaining *Betts* and *Brady* on the books, and then having a succession of cases in this Court where in every instance where a state did not appoint counsel the case is brought up here and you have it automatically reversed, finding special circumstances; so that while *Betts* and *Brady* is being obeyed in form paid lip service to, any discerning person would know that unless the state does that, the case is coming up here and getting reversed. Do you think that between maintaining that kind of a situation and just getting *Betts* and *Brady* off the books, which would you think was the better? Sitting as you, with your responsibility representing the state, knowing the operation of your courts.

MR. MENTZ: I'd rather see each case—
THE COURT: I beg your pardon?

MR. MENTZ: I'd rather see each case decided individually.

THE COURT: Even though you know they're all going to be decided the one way?

MR. MENTZ: Well, we—hope springs eternal—

The hopes of Alabama, Florida, and North Carolina to maintain the system sanctioned by *Betts* ended on March 18, 1963, with the decision in *Gideon*. The North Carolina legislature quickly recognized the need to take action to create a framework for implementing the new right to counsel. In short order, the General Assembly enacted N.C.G.S. 15-4.1, which provided: “When a defendant charged with a felony is not represented by counsel, before he is required to plead, the judge of the superior court shall advise the defendant that he is entitled to counsel. If the judge finds that the defendant is indigent and unable to employ counsel, he shall appoint counsel for the defendant.” Appointment of counsel in misdemeanor cases remained discretionary. The legislature appropriated \$500,000 for the payment of counsel for the

fiscal year ending June 30, 1964, and an equal sum for the next fiscal year.

The legislature also created a study commission to consider the creation of a public defender system. The Final Report of the Committee for the Study of the Advisability of a Public Defender System in North Carolina begins by noting that: “Though there has been much criticism of the court's conclusion in the case of *Gideon v. Wainwright*, the fact is inescapable that it has had a marked effect on criminal procedure in state courts.” The committee invited the presidents of the State Bar and the North Carolina Bar Association to inform their membership of the meeting. The report detailed the debate among members of the bar regarding the merits of the existing system of appointing private lawyers and the possibility of creating staffed public defender offices, a debate that continues today. The report observed:

Though the present assigned counsel system has many leading advocates among the members of the Bar, the committee has received what it considers to be intelligent

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A History of the State Bar's LAMP Committee

BY MARK E. SULLIVAN

A Frightening Phone Call

It was a cold, rainy day, and the telephone call didn't make it any more pleasant. "It's for you, Mr. Sullivan. It's the State Bar...."

I picked up the phone with more than a bit of trepidation. I'd been in private practice in Raleigh for two years, and there was nothing since 1978 that I'd done which should have invited the scrutiny of the North Carolina State Bar.

"Hello, Mark. This is Bobby James." OMG, I thought—that's the secretary himself! "I was wondering if you could come down to my office for a while if you're not busy."

While I walked the two blocks down Fayetteville Street I wondered what the reason was for the meeting. I didn't have long to wait. When Mr. James met me at the office door he said he wanted to introduce me to a friend, Robinson O. Everett. Mr. Everett, who was in the office, was there to discuss a topic of mutual interest which he said would benefit the State Bar.

I'd never met Judge Everett before, but I'd heard of him. The "judge" came from his term on the United States Court of Military Appeals, culminating with his appointment as chief judge. His current project, Judge Everett explained to both of us, was the formation of a military committee within the North Carolina State Bar; an organization that would allow bar councilors and committee members to lend assistance to those lawyers in uniform who were serving in the state. It would also allow the State Bar to oversee the competent and professional delivery of legal services at military installations within North Carolina.

Somehow he and Mr. James had found out about my service at the JAG Office at Ft. Bragg—I was assigned to the staff judge advocate for the XVIII airborne corps from 1972 to 1976. But what did they want done? What

was the committee to do on a month-to-month basis? Were there any assignments other than conducting quarterly meetings? What did the lawyers at North Carolina's military bases need from us, and how could we help?

A Problem in Search of a Solution

The problems that needed solving were pretty obvious. With the third largest military population in the country, North Carolina has six major bases: Ft. Bragg, Camp Lejeune, Pope Air Force Base (now Pope Army Airfield), Seymour Johnson Air Force Base, Cherry Point Marine Corps Air Station, and New River Marine Corps Air Station. Active-duty lawyers from all branches of the armed forces—save for the naval coast guard—were stationed within the state. Due to military assignment policies, most of them were licensed in other states. Due to local base policies, most of the new lawyers were assigned to a stint in legal assistance at the start of their tour of duty, usually lasting six months to a year.

None of the bases had any substantial and user-friendly resources for the judge advocate to use in delivering legal assistance services. That meant no CLE manuals, and no info-letters explaining the law in plain English (both theory and practical aspects) to a new lawyer. And there were no client handouts that would give the individual visiting the legal assistance office—whether servicemember or spouse—a ground-level explanation of such issues as landlord-tenant law, consumer protection, divorce, or traffic tickets.

The workload for legal assistance attorneys was—and still is—staggering. Quite often, appointments on civil law matters are scheduled every 20-30 minutes. As a general rule, judge advocates do not go to court. They are limited to in-office advice; however, this advice



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is about virtually any civil legal problem. The issues are limited only by the number of individuals who walk in the door for an appointment.

This was not just the rule in North Carolina; it happened everywhere. Sam Wright, a retired navy reserve captain, tells the following story about his limited (but amazing) career in legal assistance:

In my 37-year career in the navy and navy reserve I spent a grand total of 12 days at sea, and that was in March 1977. After I graduated from the basic lawyer course at the Naval Justice School, I flew to New Orleans and got on board a destroyer. Not having any particular duties to perform, I made myself available to do legal assistance

for the crew. I got lots of clients because there is normally not a lawyer on a destroyer. Many of their stories were interesting, but one took the cake.

The client was a 2nd class boatswain's mate (E-5). He had been married—his first marriage and her first marriage. They divorced with no children. After divorcing my client, the wife married a marine. While still married to the marine, she had a brief liaison with her first husband (my client—remember?). Then she bore a child. The child was presumed to be the marine's child, under the presumption of legitimacy. The sailor was convinced that it was his child, but this was in the “dark ages” before DNA testing. The wife then divorced the marine and married a guy in the air force. The sailor came to see me because he had learned that his ex-wife was in the process of divorcing the air force guy. He told me that he wanted to obtain custody of the child: “I am afraid that she is going to marry somebody in the army next, and I am tired of my kid bouncing around among the services.”

I was convinced that he was telling me the truth. He did not seem bright enough to make all this up.

We were at Mayport, Florida, for about 24 hours, and I went to the Naval Legal Service Branch Office to do legal research *in books*. This was several years before Al Gore invented the Internet. I determined that in South Carolina, in 1977, there was an irrebuttable presumption of legitimacy. I also made an appointment for the sailor to see a navy reserve judge advocate in Charleston, SC, which was also the location of the divorce action between the wife and the air force guy—husband #3.

Fast forward... Fifteen years later in 1992 I attended a JAG refresher course, and one of my classmates was a judge in South Carolina in the navy reserve JAG Corps. He was amazed when I told him this story. He confirmed for me that in 1977 in South Carolina the presumption of legitimacy was indeed irrebuttable, and that in the intervening 15 years it had been made rebuttable. That was the sum total of my legal assistance experience in domestic law—and I am a richer man for it!

Strange stories, complex issues, and confused clients were no stranger to army legal assistance either. During my own tour of duty at Ft. Bragg I came across a bewildering array of civil law issues ranging from Fayetteville

bait-and-switch tactics to Texas mineral rights, from fraudulent enlistment to a contract for a “hit man” to take out the client's husband. Every case was new, and every client had a half hour—at the maximum—to spill the beans and “get lawyered up.” Most cases were handled through advice and a phone call or letter. More complex issues, which could not be resolved in the first meeting, were scheduled for a follow-up session. With the backlog of clients often stretching out two or three weeks, this meant that efficient follow-up was impossible. There were a few friendly lawyers in Fayetteville who I could contact, but there was no real, systematic training in “local legal assistance” (as opposed to the general information given at one's law school and at the army JAG school). Success in legal assistance was measured in terms of initiative, creativity, and a “sink-or-swim” philosophy. Learning for lawyers was usually OJT, or “on-the-job training.” Help was desperately needed.

The first meeting of the Legal Assistance for Military Personnel (LAMP) Committee (currently known as the Standing Committee on Legal Assistance for Military Personnel) bore this out. In attendance were the staff judge advocates from all of the state's military installations—the “general counsel” of each base, you might say. Most of them were accompanied by their chiefs of legal assistance—usually a senior captain. And they wanted assistance. They were looking for resources to help their JAG officers provide competent and complete advice, and they wanted to have tools for educating their clients the minute that they walked into the office.

There were no answers at the initial meeting, but over the next several months Judge Everett and I met and set out an agenda. The initial tasks were to educate the clients and the judge advocates so that they would have printed information about North Carolina law. This eventually developed into a series of info-letters for clients (called TAKE-1 handouts) and for legal assistance attorneys (Co-Counsel Bulletins). They covered such topics as powers of attorney, wills, separation agreements, probate, child support, divorce, and alimony. There are currently 25 handouts in the TAKE-1 series and 22 Co-Counsel Bulletins.

In 1997 the info-letters went nationwide as two new series appeared. The Silent Partner is for legal assistance attorneys and civil practitioners. It features topics that are essential to the sound practice of legal assistance and preventive law, including ones on lawyer referral,

child support, custody and visitation, and *seven* handouts on military pension division. There are 19 Legal Eagle handouts for clients featuring such common topics as divorce, the Survivor Benefit Plan, separation agreements, custody in deployment, VA disability compensation in divorce cases, and how to find a lawyer for a military divorce. There is even one called “Fact or ‘WHACKED’? Myths and Mistakes in Military Divorce.” All of the Silent Partner and Legal Eagle info-letters are written for a worldwide audience; they are not state-specific.

LAMP Training Conferences, Operation Stand-By

By 1983 it became apparent that the committee needed to go further than just written information and client handouts. Judge advocate officers were enthusiastically responding to instruction on child support enforcement, separation agreements, custody, and divorce topics at the annual “Quail Roost Conference” sponsored by the North Carolina Attorney General. It was time for a regular training program sponsored by the committee.

This was uncharted territory. No committee of the State Bar had conducted CLE programs—this was seen as solely the province of the North Carolina Bar Association. Once again, the “public protection mandate” of the LAMP Committee provided the rationale for this innovation. The best way to get and hold the attention of the audience (then solely legal assistance attorneys, now a mixture of military and civilian lawyers from on—and off—post) would be the lecture or panel discussion provided by the traditional continuing legal education program. The first NC LAMP Conference was held at Camp Lejeune in the fall of 1983, and it proved to be immensely popular. CLE directors have included Lori Kroll, an army reserve JAG lieutenant colonel, and the present CLE director, Winston-Salem lawyer George Humphrey.

Another early effort to improve legal assistance services was Operation Stand-By. Modeled after a similar program adopted by the Florida State Bar, this was an effort to enlist the help of civilian attorneys in answering telephone inquiries from legal assistance attorneys on civil and criminal matters.

Volunteer application forms were distributed regularly through the State Bar *Quarterly*, and the list eventually grew to

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The Dean's Speech

BY HEATHER ADAMS

Sometimes when I tell people that I'm from Mt. Anders, I can see their minds working. They picture my mother as a hair dresser in a place where the tile floor is peeling up in the corners and there's a faint smell of cigarette smoke in the air. They imagine we lived in a trailer with a metal front door of indeterminate color and a clothesline in the backyard, bordered with cinder blocks. I don't blame them. The truth isn't far off. My brothers and I grew up in a tiny white house where the rusting gutters hung off the side of the roof. The three of us slept in one of the two bedrooms at the back of the house—the boys in bunk beds and me in a twin bed. The way we were squeezed into the space reminds me of how I'd try to stuff my feet into sandals two sizes too small.

Thinking back now, I'm surprised we didn't fight more than we did. The biggest argument I can remember happened when my brother Greg was about 11 years old, which would mean I was nine at the time. He had caught a lizard, which for some reason he named Fluffy. He kept Fluffy in a cardboard box under his bed until one day the lizard disappeared. Greg accused me of letting Fluffy go.

"From day one, I saw you turn up that snooty nose of yours, thinking he smelled," he said, squeezing my arm.

"I didn't. I promise. I've never laid a hand on him," I said, shaking my head and trying to move my arm out of his grasp. That was when he grabbed the scissors that had been lying on the kitchen counter and held them up to my ear.

"You better tell me what you did with him. Right now."

"I didn't! I promise. I didn't do anything to him," I shook my head. But he didn't believe me. I felt the metal blade as he pressed the scissors to my ear.

"No! Please don't! I promise I didn't do

anything!" My voice was starting to crack. "Don't cry, don't let him see you cry," I told myself over and over again as he crunched the scissors down on my hair. Dark brown hair fell in clumps to the sticky vinyl kitchen floor. He flung the scissors down and left through the back door, the screen flapping behind him. At first, I was relieved that he hadn't cut my ear, but when I looked in the mirror and saw the state of my hair, hot tears fell down my cheeks.

Later on, of course, he apologized. He even brought me an elastic band so that I could pull my hair back into a ponytail. It had a bright yellow plastic flower on it. Staying mad at him wouldn't grow my hair back any faster, so I told him thank you and that was that. We never did find out what happened to the lizard.

Once I got to high school, my brothers weren't around much. For the most part, I was left to fend for myself. I did my homework first thing when I got home from school, and double-checked that it was in my bag before I left to walk to school. My mom never packed lunch for me, so most days I would ask her for lunch money on my way out. On those days when she was still sleeping or didn't have any money to give me, I would search for coins behind the couch cushions or ask my friend Leslie at school if she would share with me. As we ate, she would twist the cellophane wrapper from her crackers around her finger. We talked mostly about boys. I wasn't the only girl in school who had a crush on Trey Hunter. He wasn't the captain of the football team or anything like that. He was quiet and smart. On Tuesdays and Thursdays I attended the academically gifted reading class, and that was when I got to see Trey. The class took place in a small classroom that, because of its proximity to the cafeteria, always had a faint smell of baked beans. Trey had short curly blonde hair and very blue eyes. He had a backpack that

The Results Are In!

In 2011 the Publications Committee of the State Bar sponsored its Eighth Annual Fiction Writing Competition. Eight submissions were received and judged by a panel of nine committee members. The submission that earned third prize is published in this edition of the *Journal*.

looked brand new and a small zippered pouch stuffed with mechanical pencils. He went to the spring formal with Susan Whitman, whose dad owned the only restaurant in town. Her mom picked her up every day in a station wagon. I imagined that she always brought with her an after-school snack for Susan: a peanut butter sandwich wrapped in wax paper, or yeast rolls from the restaurant, still warm from the oven.

The only reason I even knew about those yeast rolls was because Mrs. Layton, my social studies teacher, took me to the restaurant once. Its name was Blue Fin Grille, despite the fact that we weren't anywhere near the ocean or any other body of water. Mrs. Layton took me there to talk about "my Potential." Every time she said the word, I imagined it with a capital "P."

She had thick wavy brown hair that she often wore pulled back. She dressed in what I thought of as Easter egg colors: pale blue sweaters, mint green skirts, and pink button-down shirts. She wasn't exactly pretty, but she always looked shiny and polished, with shimmering pink lipstick and her nails painted to look like creamy white pearls. She wasn't the most popular teacher in school; she was too loud for that. When she talked about the Constitution, her eyebrows went up and her earrings shook with what I guessed was some-

thing like excitement. Most of us preferred the teachers who were more laid back. All of her energy made me nervous, like she was going to pounce. Still, when she asked me to dinner, I couldn't exactly say no.

She picked me up in her navy blue Buick, turning up the heat when I shivered in my thin cardigan. When we arrived at the restaurant and parked in the gravel parking lot, Mrs. Layton assured me again that I could order anything I wanted. She had told me that on the car ride, too.

"Now honey, you just go ahead and look over that whole menu and get you anything you want. Lord knows your mama doesn't have enough to put a hot meal on the table too often."

"Yes ma'am," I nodded, not sure whether to confirm or deny what she'd said about my mother. She was pretty good about heating up soup for us out of cans she could buy two for a dollar. On the nights she made soup, mama even combed her hair and sat with us at the table. To keep her in a good mood, I always offered to wash the dishes when we were finished eating.

I didn't tell Mrs. Layton any of this. I watched as she told the hostess, "Two, non-smoking," and I followed the hostess in her tight black skirt and Mrs. Layton in her lavender pants to a vinyl-covered booth near the middle of the restaurant.

Before she even looked at the menu, Mrs. Layton said, "Miranda, here's the thing. I asked you to dinner because I wanted to talk to you about your college plans. You have a lot of Potential. I don't want you to miss out."

"Thank you." I pushed my hair behind my ear. "I appreciate it. This is very nice of you." I kept my eyes down on the table cloth.

I liked Mrs. Layton, even though I felt awkward being the object of such direct attention. My own mother never so much as mentioned college to me. She worked down at the paper mill at the base of the mountain. Between the first and second shifts she swept the washer room, the bleach tower, the refiner, and the big room where the presses and dryers clanked away. When she was finished sweeping she wiped up the dingy tiled bathrooms and emptied the trash cans. From what I knew, she'd been doing this job since she dropped out of the tenth grade. It didn't seem to pay much, but I guess it was enough to keep the heat on in the winter and at least some food on the table. Most of all, I knew it made her tired, so tired that some days she

didn't even come out of her room when I got home from school. Some days I wouldn't see her at all. I'd tip toe across the hall to her room and slowly open the door. As long as I saw her small shape under the pale yellow chenille blanket, I figured she was okay and just needed her rest.

Mrs. Layton was different. She leaned forward, clutching her glass of iced tea with both hands. There was this kind of energy with her. I saw it in the way she wrote so fast on the chalkboard at school—sometimes the chalk would fly out of her hand, unable to keep up.

"Have you thought much about what your plan is?" she asked.

I didn't really imagine myself cleaning up at the paper mill like my mother did. But what were my options? Sometimes I did think about teaching science one day—maybe at the middle school or even high school. I hadn't ever told anyone that before. For some reason, sitting there in the booth at the Blue Fin Grille, I found myself telling Mrs. Layton.

She nodded. "Sweetie, I think you may be onto something here. I know social studies is my thing, but just now, when you talked about the structure of DNA, you practically made it sound poetic." We both laughed.

After the server came to take our orders and turned to walk back toward the kitchen I said, "I know it sounds far fetched, but to me it kind of *is* poetic." I shrugged my shoulders, not wanting to appear too serious.

"Well, let's come up with a plan of action," she said, reaching into her canvas tote bag and pulling out a pad of paper and a pen.

By the time I went to bed that night my mind was racing. Mrs. Layton had talked about colleges, entrance exams, and scholarships. She had agreed that the guidance counselor was counting the days until her retirement and would be of little help to me.

"Don't you worry," Mrs. Layton had said on the way to take me home. "I'll write off for some brochures. That stuff in the office is outdated by several years and won't be much help." My science teacher was a grouchy old man with sweat stains on his shirts whom I'd never seen smile, but she promised to ask him about writing a recommendation for me. As I finally drifted off to sleep, I prayed, "Please God, let her not forget this tomorrow."

In the next few months, I stayed late after school to talk with Mrs. Layton about college programs, financial aid applications, and scholarships that might be available. My mother never asked why I got home from

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school later than I used to. I'm not sure she even noticed.

It was in February of my senior year that I got the letter. It was midway through the stack of slick circulars that smelled like ink. I held the textured ivory envelope in my hands. I had to sit down. I sunk down right there on the floor and, putting aside the other mail, opened the letter.

When I told my mother about the scholarship interview, her eyes got big. "But how are we gonna get you up there? That's two hours away." She shook her head.

"Mrs. Layton said she could take me," I offered, waiting to see her reaction. I didn't want her to realize that I'd called Mrs. Layton that afternoon before mentioning it to her. She sighed and patted the kitchen counter.

Finally, she nodded, "I guess that'll be alright then." We didn't talk about it again.

One day after school, Mrs. Layton came to our house carrying a suit on a plastic hanger. It was made out of scratchy-looking black and grey tweed, several sizes too big, and it smelled like moth balls. I held it up in front of the mirror and smiled. Now I wouldn't have to worry about what to wear.

* * * * *

Eventually, I would tell Aaron about Mrs. Layton. It must have been about a year before we were married. He leaned his head back against the couch while I talked. "And here I thought you never needed any help," he said.

"Well, now you know. I don't always have to do everything myself," I said as I playfully hit his arm.

"Seriously, though, maybe we should go visit her some time?" he asked.

I nodded. I had kept in touch with Mrs. Layton over the years, but I hadn't made any effort to visit her in person. I hadn't been back to Mt. Anders for years. My brothers had moved away. Mama had died—when she didn't show up for work one day, the receptionist from the paper mill came looking for her. The front door was unlocked and she found mama face-down on the floor of her bedroom.

We were always busy, or so it seemed, and it turned out to be another 20 years before Aaron and I went to see Mrs. Layton. Our visit was in September, shortly after the start of the school year.

The day before we left I got up early, even before Aaron, who normally got up before I did. Pulling my robe tight against the chill in the air, I went into the guest room and sat down on the bed. The house was quiet. The guest room was at the back of the house. A tall antique mirror stood in one corner, reflecting the four-poster bed in the center of the room in shadowy glass. We had put a sage green and taupe Oriental rug on top of the wood floors. Across from the bed was a wide mahogany dresser, with heavy pulls so dark they were almost black. Above the dresser there was an oil painting in an old silvery frame. The scene was of a mountain—blocks of green and swirls of blue and brown. It wasn't Mt. Anders, but sometimes I imagined it was. I sat there on the bed, smoothing the white down comforter with my hands, taking deep breaths in and out, for what seemed like a long time.

On the day of the speech, the sky was

cloudy. I had laid out my clothes the night before on the small couch in our hotel room: a black wool crepe dress with elbow-length sleeves, an amethyst pendant, and black leather heels. As I got dressed, Aaron went downstairs to get coffee. I looked in the mirror and sighed. My 50th birthday was coming up, and I could see faint lines around my eyes and mouth. I checked my tote bag again to make sure my typed notes were in there, just in case I forgot what I planned to say.

Our first stop was to pick up Mrs. Layton. She was in her late 70s now, and she had given up her driver's license. I saw her waiting for us on a bench beside the front door of the small retirement community where she lived. She was wearing a pale blue trench coat over a purple sweater and navy pants. Her hair, now silver, was pulled back into a loose bun at the back of her head. Her pink shimmery lipstick was the same it had always been.

She smiled when she saw me. "Now who's this tall drink of water?" she asked, looking over at Aaron. "Mrs. Layton, this is my husband, Aaron. I'm pretty sure I've mentioned him in my letters," I said laughing as I hugged her.

Aaron helped her to the car while I climbed into the back seat so that she could sit in the front. She put her purse on her lap, and as she twisted around to get the seatbelt she said, "Miranda, I'm so curious what this is all about that I didn't sleep a wink last night."

I shrugged my shoulders, not wanting to give anything away. "Oh, you'll find out soon enough," I told her.

Farrow County High School was about how I had remembered it. It was made of plain red brick, three stories tall, with a wide concrete sidewalk out front. Inside the auditorium it was louder than I had expected. It seemed that all the students were talking at once; their shoes squeaked on the floor and their conversations were punctuated with loud bursts of laughter. As the principal, Mr. Anderson, led me up to the stage, I made sure that Aaron and Mrs. Layton had been seated in the front row.

The first half of the assembly passed in a blur—the national anthem and pledge of allegiance, announcements about the first football game, and auditions for the drama club's first play of the year. After an explanation of the new homeroom procedures being implemented this year, the principal introduced me.

"It is with great pleasure that we welcome

Dr. Miranda Simpson, who has an announcement to share with us. Dr. Simpson works in the field of genetics and is dean of one of the country's best medical schools. She is also a graduate of Farrow County High School. We won't say how many years ago." He winked at me as I came up to the podium.

I took a deep breath. The lights were so bright.

"Good morning. I know you have other things to do today, so I won't take much of your time. Mr. Anderson mentioned that I attended this high school. Although it was a long time ago, there are certain aspects that I remember. When I was in school here, I spent a lot of time worrying about boys—who liked me and who didn't. I also thought a great deal about who had what I didn't have. The girl who had gold earrings in the shape of butterflies. The twins who came to school with containers of pasta for their lunch. The boy whose dad gripped his shoulder in a proud way on the walk back from a game. I thought they—all of them—had been blessed with luck in ways I would never be.

As it turns out, my luck came to me through my social studies teacher, Mrs. Dorothy Layton. She presented it—my luck—to me as a gift, wrapped not in shiny paper, but in time and attention. In honor of her, I am starting a scholarship program here. My hope is that it will be enough to ensure that the recipient each year can attend the college of his or her choosing."

"Mrs. Layton," I looked down at her, wiping away a tear at the corner of my eye before I went on, "you taught me a lot more than social studies. You taught me that a person is limited not by their circumstances, but only by the walls they themselves build. That true goodness makes itself known in the way a person acts, even when it's inconvenient or unrewarded. That sometimes you have family where you didn't expect it.

I don't know how many hours you spent researching colleges and scholarships for me, or helping me with applications, essays, and interview preparation. What I do know is that when others were too tired or couldn't be bothered, you weren't."

As I walked down the steps, we nodded at each other, Mrs. Layton and I. ■

Heather Adams is a member of the Litigation and Trial Practice group at Alston & Bird LLP. She works in the firm's RTP office, and her practice focuses on class action defense.

Before Atticus Finch, There Was Mr. Tutt

BY G. STEVENSON CRIHFIELD

Harper Lee wrote a wonderful novel entitled *To Kill a Mocking Bird*, in which Atticus Finch is a small town lawyer in Mississippi. Finch personifies a wonderful professionalism that has become a blueprint for lawyer

aspirations in recent years when discussing professionalism.

However, before Atticus there was another lawyer who served the same function. His name was Ephraim Tutt. Tutt was the creation of a lawyer named Arthur Train, an assistant district attorney in Manhattan in the early twentieth century. Mr. Tutt first appeared in the *Saturday Evening Post* in 1919, and his stories continued over a number of years. Eventually, they were collected into various volumes of stories. Each of them is based on some legal maxim.

For instance, President Nixon once stated that his favorite piece of legal fiction was a story about Mr. Tutt entitled "The Dog Andrew." This story revolves around the legal question of whether every dog is entitled to the first bite.

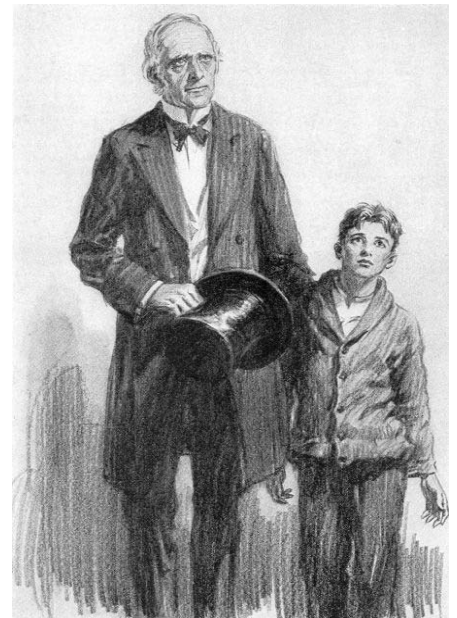
In a collection of Mr. Tutt's stories entitled *Mr. Tutt at His Best* there is an introduction by a federal judge named Harold R. Medina who was a well-known jurist. Judge Medina, from his early law experience, was a great admirer of Mr. Tutt. In referring to the stories he states, "They fascinated me, as they did thousands of other young lawyers eager to believe that justice was not necessarily at the mercy of prose-

cutors who wanted convictions, sometimes from motives that were none too pure, or of the large number of unscrupulous persons in various categories connected or not connected with the law, who seem so often in real life to prevail over the righteous and the just. ...Mr. Tutt was my hero."

One of the most remarkable aspects of Mr. Tutt's life as reflected by Author Train was that he, Train, summed up in his mind's eye Pottsville, a small town in upstate New York where Mr. Tutt was allegedly born and raised.

Train described Mr. Tutt once he grew to adulthood and became a lawyer as a "ram-shackley, old fellow with a whimsical, deeply-wrinkled face, dressed in a funny old frock coat and a blue string tie." Tutt is further described as having grown long behind his ears, wearing an old stove pipe hat and congress shoes, and always carrying a mahogany ivory-headed cane. He smokes rat tail stogies that cost \$2.85 a thousand.

Judge Medina describes Mr. Tutt as Robin Hood, Don Quixote, and Sir Galahad all rolled into one. The remarkable thing that Train did was to publish a book entitled



"At That Moment...Mr. Tutt Emerged from Behind the Jury Box and Took His Stand at Tony's Side."

Yankee Lawyer; The Autobiography of Ephraim Tutt. This was an absolute hoax and the result was that learned law reviews assessed the book and tried to discuss just who Mr. Tutt was. Train actually wrote a review of his own book for the *Yale Law Journal* and praised the book to the skies. There then was the question of whether Mr. Tutt should be included in *Who's Who in America*. At that point Charles Scribner, the publisher of Tutt's books by Train, called a halt to the hoax and told Train that he simply had to admit the fictitiousness of the whole thing, which Train did with a smile on his face.

Lawyers who would like to know more

CONTINUED ON PAGE 46

The Unforgettable Ms. McKinney

BY HUGH STEVENS

To borrow a phrase from the *Reader's Digest*, Joyce McKinney is “one of the most unforgettable characters I ever met,” but I had not thought about her in years until a couple of months ago, when I read *The New York Times*’ review of *Tabloid*, a new documentary film about McKinney by Errol Morris.

If you have been fortunate enough to have had Ms. McKinney escape your notice until now, here’s a summary of her background by *Washington Post* writer Michael O’Sullivan:

Though McKinney is less than a household name in the United States, in 1977 the former beauty queen from small-town North Carolina made headlines in England when reports surfaced that she had abducted a 19-year-old Mormon missionary in London named Kirk Anderson, allegedly holing up with him in a remote cottage for several days of nearly nonstop sex. Handcuffs may or may not have been involved. And Anderson—with whom McKinney apparently shared a romantic history of some kind back in Utah—may or may not have been a willing participant. Once the British tabloids got hold of the story, it turned into a lurid tale of the “manacled Mormon,” as headlines at the time referred to Anderson.

To me, Morris’ choice of Ms. McKinney as a documentary subject is unfathomable—especially now that I have seen a DVD version of *Tabloid*—but many critics, including the legendary Roger Ebert and *The New Yorker*’s David Denby, have given the film high marks (though Denby did label it “strange”). Ms. McKinney herself has stimulated interest in the film—and numerous postings on YouTube®—by showing up at festival screenings and loudly denouncing

both Morris and his movie.

Although Morris’ film will tell most viewers much more about Ms. McKinney than they probably care to know, it does not mention the libel suit that she filed against *The Avery Journal* in the late 1980s. Together with Kelly Johnson, a Newland attorney, I defended the suit, which is how I came to meet the eccentric, self-absorbed woman whom Morris inexplicably has rescued from the obscurity to which she is so richly entitled.

Ms. McKinney’s lawsuit against her hometown’s weekly newspaper and its editor, Bertie Cantrell, arose out of an altercation in August 1986 between McKinney and her neighbor, Judy Benfield, over the incessant barking of Ms. Benfield’s hound dogs. After exchanging threats and insults, the two women swore out criminal warrants charging each other with “communicating threats.” The *Journal*’s first story about their dispute included the following paragraphs:

Miss McKinney made international headlines several years ago for allegedly kidnapping and raping a Mormon missionary in London, England. Miss McKinney fled Europe before the trial was over and is still listed in INTERPOL although authorities in England have



made no attempt to extradite her.

[Mrs. Benfield’s] warrant had not been served at press time as the Avery County Sheriff’s Department has been unable to locate Miss McKinney.

The *Journal*’s story the following week included these statements:

Sheriff Clinton Phillips said he notified both women to come to the jail and be served, as is often done in misdemeanor cases against county residents. Judy Benfield came to the jail for her warrant to be served against her and signed a written promise pending court action. Joy McKinney never came in to have the warrant served and make bond and has apparently left the county in an attempt to avoid arrest.

A few weeks after the articles appeared Ms. McKinney sued the *Journal*, Ms. Cantrell, and Mrs. Benfield for libel. She vol-

untarily dismissed that suit in September 1987. In January 1988 she filed a similar suit in the US District Court for the Western District of North Carolina, which swiftly dismissed it on jurisdictional grounds. Undaunted, she re-instituted her state court action in July 1988.

My first face-to-face encounter with Ms. McKinney was at her deposition, where she turned out to be one of the most combative, argumentative witnesses I have encountered in more than 40 years of law practice. She was feisty, fidgety, and frustrating. She could have given Bill Clinton lessons in hair-splitting. Two of her favorite techniques for evading or finessing a question were to pretend that she didn't understand it, or to respond to it with a question of her own. Another was to launch into a soliloquy about how she was a victim of "Mormon lies," or how Ms. Cantrell had conspired with Ms. Benfield to ruin her reputation.

We based the *Journal's* opposition to Ms. McKinney's libel suit on the "wire service" defense, a legal doctrine which provides that a writer is entitled to rely on and repeat factual statements published by reputable news organizations, such as the Associated Press, so long as he or she has no reason to believe that the statements are untrue. At the time, the defense had not been recognized in any North Carolina case, but Ms. Cantrell's files were replete with stories about Ms. McKinney's UK escapades clipped from *The Charlotte Observer* and other newspapers from around the country. When we confronted Ms. McKinney with the clippings she didn't deny that the stories had been published, but dismissed their contents as lies planted by the Mormons to discredit her.

We also asked Ms. McKinney about stories published in two British tabloid papers, *The Daily Express* and *The Daily Mirror*, including an article in the latter that was illustrated by a nude photo of her sitting on a horse (which also was bare-back). Ms. McKinney testified that "to the best of [her] memory" she had never posed for such a photograph. She theorized that the photo was created either by superimposing her face on another woman's body, or by stealing and "retouching" an actual photo of her in which she had been clothed.

The Avery County sheriff provided us with an affidavit confirming the *Journal's* statements that Ms. McKinney was still list-

ed in INTERPOL, and had avoided his attempts to serve her with Ms. Benfield's warrant.

Armed with Ms. McKinney's deposition transcript and the sheriff's affidavit, we moved for summary judgment on behalf of the newspaper. Judge Robert W. Kirby, a seasoned and phlegmatic superior court judge from Gaston County, heard arguments on our motion in Newland in October 1988. Terms of civil superior court didn't happen very often in Avery County in 1988 (they still don't), so the courtroom was packed with parties, witnesses, and potential jurors. The jury box was occupied by out-of-town lawyers who had come to argue other cases. One of them was John Edwards, who was then an associate in a Raleigh law firm and whose own tabloid notoriety lay far in the future.

As Ms. McKinney's lawyer and I made our presentations to Judge Kirby, she grew more and more agitated. She began to squirm in her chair, and both her facial expressions and her body language conveyed her rising annoyance. Finally, she began interjecting increasingly loud vocal comments saying, "Your Honor, I have to live here!" and (referring to me), "I'm tired of hearing him lie over there!" and, "I just can't stand these lies anymore!" When she refused the admonitions of both Judge Kirby and her own lawyer to sit down and be quiet, the judge suggested that she go outside saying, "It's not necessary for her to be here." Her father, who was among the startled spectators, came up out of the audience and led her up the aisle to the back of the courtroom. As the door closed behind her she was still protesting.

Judge Kirby granted our motion for summary judgment. Ms. McKinney appealed. In July 1990 the North Carolina Court of Appeals affirmed Judge Kirby's ruling. The court's opinion recognized the "wire service" defense saying that most of the information at issue

...was taken from wire service stories published in such newspapers as *The Charlotte Observer*, *The Winston-Salem Journal*, *The Asheville Citizen*, *The Greensboro Daily News*, and *The News and Observer*. One of these articles was an Associated Press dispatch published in *The Charlotte Observer* on 24 November 1977, which reported the sworn courtroom testimony of Kirk Anderson, the

Mormon missionary plaintiff was charged in England with kidnapping. The graphic testimony charges that plaintiff and an accomplice abducted Anderson and chained him to a bed, at which time plaintiff performed oral sex upon him and, having stimulated him against his will, proceeded to have sexual intercourse with Anderson against his will.

Defendant Cantrell relied on reputable wire services and daily newspapers in writing the first part of her summary quoted above. The articles in *The Avery Journal* also were substantially in accord with the contents of the stories relied upon. As a matter of law, we do not think that Cantrell's reliance on the articles could constitute negligence on her part. ...There was nothing inconsistent or improbable in the articles upon which Cantrell relied which should have prompted her to investigate the reliability of the stories. This is a case in which application of what has been termed the "wire service" defense in other jurisdictions is appropriate. The sources relied upon by defendant Cantrell are known for their accuracy and are regularly relied upon by local newspapers without independent verification.

The court also ruled that Ms. Cantrell was justified in relying on the sheriff as the source of information about Ms. McKinney's being listed in INTERPOL, and as to the status of the warrant sworn out against her by Ms. Benfield. "In fact," the court said, "consulting a law enforcement agency may have been the only avenue for obtaining this information."

As far as I was concerned, the court of appeals' opinion closed the book on Joyce McKinney, but the release of *Tabloid* reopened it. The movie has not reached any North Carolina theaters yet, and it's not up to me to tell you whether to go see it when it does. All I will say is that for me it proved something that I have long suspected: that to Joyce McKinney, embarrassing publicity is infinitely preferable to no publicity at all. ■

Hugh Stevens is a partner in the Raleigh firm of Stevens Martin Vaughn & Tadych, PLLC. He is a nationally known First Amendment and media lawyer. For more than 20 years Hugh served as general counsel to the North Carolina Press Association.

This Could Be Fun!

Design Contest for a North Carolina State Bar Seal

Regular readers of the *Journal* will know that the State Bar has a 100-year lease from the state of North Carolina for property on Person and Jones St. in Raleigh, that the foundation has been poured for a new building, and construction is proceeding apace with fundraising by a private foundation to finance the purchase of the latest technological amenities for hearing rooms and meeting rooms. You can read about the plans in the report of the Facilities Committee in the Executive Committee minutes of the State Bar Council.

Erecting a new building is exciting, challenging, and has taken a lot of work by our volunteer council members of the Facilities Committee. Our leadership has decided that having a seal distinctive to the NC State Bar would be an impressive addition to the new building—impressed on the wall or the floor of the entryway, impressed on the bench of the hearing rooms, and mostly impressed in the minds of the more than 25,000 lawyers as a symbol of pride and meaning to those of us who have the privilege to be members of the NC State Bar.

As chair of the Publications Committee for the last several years it has been my job to steer our committee through meetings where we brainstorm ideas for articles and solicit potential names of authors. We strive to strike a balance between articles of substance and interesting personal stories about the lives of North Carolina lawyers. Our focus is on the written word. The layout and graphics are well-managed and assembled by our award-

winning editor, Jennifer Duncan.

But now we are soliciting your creative energies for a contest to design the seal. We're confident that some of you will enjoy this challenge to rev up the right brain, doodle while waiting for the wheels of justice to turn in the courtroom or at a meeting, and think about what you would like to see in an official seal of the North Carolina State Bar.

Thinking about how to gin up enthusiasm for this contest, I remembered practicing signing my name over and over again in the early years of cursive writing in penmanship.

Do others remember the horror of getting a less than satisfactory grade in penmanship in grammar school? But what's in a name and a signature? When one takes time to ponder, it is a mark and a symbol of who you are. As of now, there is a vacuum when it comes to a SEAL for the NC State Bar. The imprinted seal on your law license has the seal of the North Carolina Board of Law Examiners. That is a separate entity from the NC State Bar. You may have a notary seal with the required county and your legal name. But something more is implied when it comes to the imprimatur of an official body.

Take a look at the seals of other State Bars or organizations arrayed within this article. You will find some simple and elegant; some very traditional; and some frankly boring. Some have a connotation of pride about a particular state, not just a system of justice. Let your mind flow with thoughts of what would look good in color or black/white, etched in stone, large or small, pleasing to look at, as you ponder what justice and lawyering in North Carolina means to you. For me, a seal could embody the dignity and principles of honesty and fair-

ness inherent in the ideals of our profession. It signifies authenticity.

Driving past the new Durham County Justice Center, I wondered whether the lady liberty—looking blind and pregnant in bulging robes and holding the scale of justice—would endure as a meaningful seal through to the 22nd century. Or is the phrase and concept of blind justice and lady liberty a bit out-of-date as many have shed earlier notions that any one person or system could be truly objective, nonbiased, and listen to all sides without any prejudice. But the scales of justice, crossed swords, olive branches, and open doors have enduring meanings. What will be your thoughts? Get out your pencils, or open the sketch tool on your software, and share your thinking.

CONTEST RULES:

1. DEADLINE: June 15, 2012
2. EMAIL your design in JPEG or PDF format to:

Jennifer Duncan, Editor
North Carolina State Bar *Journal*
ncbar@bellsouth.com

3. The Publications Committee will submit the top three designs to the Facilities Committee for consideration at the July 2012 Bar Council meeting. The top three submissions will be published in the Summer Journal with recognition given to the designer.

4. The Executive Committee reserves the right to reject any submission and/or modify any design of a seal for final adoption.

5. The fine print – there will be no copyright protection for any submission as it will once submitted become the intellectual property of the North Carolina State Bar.



Bruno's Top Tips: 20 Questions for your Trust Account

BY BRUNO DEMOLLI

With the New Year should come a renewed commitment to trust account management. This 20-question checklist will help insure that your trust account is in tip-top shape for 2012.

Generally speaking, you should be able to answer in the affirmative to each of these questions:

1 Are only client funds deposited in the trust account, except attorney funds sufficient to open or service the account or funds belonging in part to a client, third party, or lawyer?

2 Is your general trust account designated as an IOLTA account and located at a bank with branches in North Carolina?

3 When funds belonging in part to you and in part to the client (e.g., a client check for legal fees and court costs) are received, are the funds deposited intact into the trust account?

4 Are trust account checks for legal fees or expenses made payable to you or your firm entered as disbursements on the client's ledger card?

5 Are all items drawn on a trust account made payable to a specific person or entity and not cash or bearer?

6 Has a bank directive¹ been filed with the bank where a trust account is maintained?

7 Is the client promptly notified of the receipt of any entrusted property² belonging in whole or in part to the client?

8 Is entrusted property to which the client is entitled promptly delivered to the client or third persons as directed by the client?

9 Have you promptly reported to the State Bar any knowledge or reasonable belief that entrusted property has been misappropriated or misapplied?

10 Have you complied with escheat requirements on abandoned or

unidentified property?

11 Are your trust account checks business-sized (greater than 6 inches in width), and do they contain in Auxiliary On-Us field in the MICR line? (The AOU field is on the bottom left of your check and typically matches the check number on the top right.)

12 Do bank receipts or deposit slips list the source of funds and date of deposit? For deposits to the general trust account, do bank receipts or deposit slips also list the name of the client or other person to whom the funds belong and the source of funds if other than personal?

13 If records of canceled checks are furnished by the bank in digital image or CD-ROM format, do the images meet the requirements of Rule 1.15-3(b)(2)(A)?

- Do they show the amount, date, payee, and the client balance against which the item is drawn?
- Is the digital image a legible reproduction of front AND back of the original item and not smaller than 1 3/16 x 3 inches?
- Does the bank maintain, for at least six years, the ability to reproduce electronically additional or enlarged images within a reasonable time?
- Are you retaining these records for the required six-year period?

14 Are you retaining all instructions to transfer, disburse, or withdraw funds from the trust account including electronic or written transfer records?

15 Are you retaining, for at least six years, all bank statements and other documents received from the bank regarding the trust account, including any notices of insufficient funds?

16 Are you maintaining a ledger containing a record of receipts and disbursements for each person or entity from

whom or for whom funds are received? Does this ledger show the current and accurate balance of funds held in the trust account for each person or entity?

17 Are general trust accounts reconciled monthly in the following manner: the balance of the trust account as shown in your records is reconciled with the current bank statement balance for the trust account?

18 Are general trust accounts reconciled at least quarterly in the following manner: the individual client balances shown on the ledgers are totaled and reconciled with the current bank statement balance for the trust account as a whole?

19 Are written accountings provided to the client upon the final disbursement of funds (i.e., when the balance reaches zero), when reasonably requested by client, and at least annually if funds are retained more than 12 months?

20 Are complete and accurate records (deposit slips, ledgers, reconciliations, etc.) of all entrusted property received by the lawyer retained for six years from the last transaction to which the record pertains?

If you answered "no" to any of these questions, or if you have any questions regarding trust accounting procedures, please review the *Lawyer's Trust Account Handbook*, available on our website at ncbar.gov/menu/publications.asp. ■

Endnotes

1. Rule 1.15-2(k) of the Rules of Professional Conduct requires a lawyer to direct each bank where he or she maintains a trust account to notify the State Bar when any item drawn on the trust account is presented for payment against insufficient funds. The directive can be found at ncbar.gov/pdfs/11.pdf.
2. Rule 1.15-1(d). "Entrusted property" denotes trust funds, fiduciary funds, and other property belonging to someone other than the lawyer which is in the lawyer's possession or control in connection with the performance of legal services or professional fiduciary services.

Get Off the Couch

BY ANONYMOUS

Mid-November 2000 I was lying on a couch in my office with the lights out, hoping the room would stop spinning. It was around 8:30 am and I found myself in the same situation again: hung over at work and desperate. I was desperate not to have to go to court and act like everything was okay. I felt empty and fearful. I was disgusted with myself and felt no hope. My life seemed to be one big black hole. I couldn't face people and I couldn't look anyone in the eye. My professional life was coming to an end, and I thought there was no stopping that inevitability. A hearing in front of the Grievance Committee of the State Bar was fast approaching. I wasn't sure of the exact date because I hadn't roused the courage to open the certified letters the Bar had sent me, nor to read the complaints and notices of hearing that had been served upon me. I had a desk drawer full of certified letters that had yet to be opened. Little did I know at the time that my life would be totally transformed from a place of dark despair and fear-based alienation and loneliness to one filled with joyous connection with others, motivated by a desire to be helpful, open, free, and available to the richness of life's experiences. This is the story of how that transformation happened.

The night before was nothing unusual. I had spent a quiet Sunday at home drinking a little throughout the day. As dinner time approached my intake increased. I had taken on the cooking chores at home so that I could have access to the refrigerator and the alcohol inside: beer, wine, or liquor of any kind. That evening it happened to be cheap wine from a box. It had become my favorite, because my wife couldn't measure how much I had had to drink. I became expert at sneaking new boxes into the house and discarding the empty one every other day or so. I downed four or five large tumblers of wine while my wife was busy putting our daughter to bed. That allowed me to sip my next few glasses at a more leisurely pace until I passed out.

This routine had become my life. Drinking until I passed out. Taking care of whatever

needed to be done—both in my personal and professional life—as quickly as possible, so that I could devote my time more fully to drinking. I nearly always showed up for work, regardless of the pain of the hangover. I never drank before work. Just the thought of it made me nauseous due to my hangover. Nevertheless, I started drinking as soon as possible, usually after lunch. Oftentimes lunch would consist of several beers at a local bar, or a six pack in my office. I shared office space with another attorney who didn't know how much I was actually drinking. After work I would stop at a convenience store and pick up another six pack and drink as many as I could before I got home. Whatever I couldn't down I took into my office the next day. I drank those before I went to replenish my stock. That led to me drinking a lot of warm beer, but it didn't matter to me. I also hid whiskey in my office at times.

I had been drinking most of my life. The first time I got drunk was when I was 11 years old. My father, also an alcoholic, thought it would be a good idea to let me drink to the point of drunkenness to get me sick, thereby deterring me. It didn't work. I remember vividly the sensation of sangria washing down my throat. It made me feel important, and it made me feel a part of something. Despite my father's actions on that night, I was raised in a loving and supportive family, albeit an alcoholic one.

After my first drunk experience I didn't start drinking on a regular basis. I can't remember the next time I got drunk. Instead, after a couple of years I discovered marijuana, and in junior high school became a daily user. This lasted until my last year of high school, when I could fake being old enough to buy beer and wine. I made the slow transition from full-time pothead to full-fledged alcoholic. I started drinking regularly during my senior year in high school, and didn't stop until that fateful day in November 2000.

I was able to drink my way through high school, college, and law school. I was able to drink my way through dating, marriage, and



becoming a father. I was able to drink my way through studying for and passing the bar. I drank my way through setting up and starting a law practice. Through all these life events, celebrations, and successes, the constant was always alcohol and I placed it above everything else that mattered. It became my king. All else suffered and was neglected to some extent due to my drinking and my preoccupation with drinking, which grew over the years.

I had never seriously tried to quit drinking. It was just a part of my life. Early on I realized that once I started drinking I didn't want to stop. I tried to control the amount I drank so that I would not get out of control. I tried to change the type of alcohol I drank so that I could drink longer before becoming so drunk that I could not control myself. There were times when I was younger when I could forgo drinking altogether for a night, when I needed to stay sober for an important reason, like a test the next day or a special event. My choice back then was to abstain altogether because I couldn't fathom the possibility of limiting myself to a couple of drinks. Even that limited control—and the ability to abstain when I really wanted to—soon left me. Drinking every night to the point of blacking out and passing out became the norm by the time I was a few years into my legal practice.

I thought of none of that as I lay on the couch in my office that morning in mid-November 2000. All I wanted was a way out of the darkness I had brought upon myself. Across the street from my office was an older attorney who was always ready to provide a helping hand to other attorneys, especially young, inexperienced ones. He had helped me

during the six years I had been practicing. And I thought perhaps he could help me again. Somehow I got myself off the couch and walked across the street and into his office. This man took time from a busy Monday morning and listened to my predicament. He called another attorney, and together they decided that the first step was to call Don Carroll with the NC State Bar's Lawyer Assistance Program (LAP). The next step was to call the Grievance Committee.

My problem with the Grievance Committee was straightforward and easy to correct. A trust account audit had shown that I was not compliant with the Bar's trust account regulations. After the audit I had been required to take a few simple steps to come into compliance, but I had neglected to take the proper corrective actions. I then failed to respond to further communications from the Bar. I had also neglected to perfect an appeal that I was involved in, leading to the appeal being dismissed. As those deadlines had approached and passed, I drowned my concerns with alcohol. Despite having work that needed to be done, my thoughts always turned to alcohol. I would always plan to start the work, but as if under some spell, I always started to drink instead.

After contacting the LAP I was directed to undergo a substance abuse assessment, something I had often counseled clients to do. For me, it was an eye-opening experience. I had never honestly talked about my drinking with anyone. I had always lied when discussing how much and how often I drank. Even with doctors who were trying to diagnose a stomach disorder, I significantly under-reported my drinking. Finally, I found myself in a position where, for once, I thought I should be honest. Thankfully I was. I remember thinking that I wasn't drinking *that* much. I thought that I likely would be referred to outpatient treatment or some other form of counseling. When the meeting took place to announce the recommendations following my assessment, I was shocked to learn that they intended for me to go to detox for several days. When I told the counselors I thought that recommendation was extreme, they offered an alternative—a 28 day in-patient treatment stay. Detox suddenly seemed reasonable.

I called my wife to ask her about the possibility of our insurance covering detox. Rather than her having to check with our insurance company, I was surprised to learn

she had already investigated this possibility months earlier. I later learned that the LAP was already aware of my situation, and that someone had already referred me to them. It turned out I was not as successful at hiding my drinking as I thought I had been. It also turned out that I was not as alone as I thought I was.

Within 48 hours of asking for help, Don Carroll had arranged a bed for me at a local hospital detox. I do not remember much of what happened in detox, frankly. I do remember several lawyers coming to talk to me—lawyers who had been through what I was going through. They were there to offer support and hope. I cannot remember all of their names, nor can I remember what they said. I do remember feeling for the first time in a long time that all was not bleak and desolate. I also remember being given medication and eating chocolate cake. And for the first time I went to a meeting of Alcoholics Anonymous (AA).

I had some familiarity with AA because my father got sober when I was 19 years old. He and I had been occasional drinking buddies. His professional life was jeopardized by his drinking, and his employers coerced him into treatment. Ironically, I was the one who drove him to the in-patient treatment facility. However, other than that one family meeting at that facility, I never had considered seeking treatment or getting peer support from others dealing with alcoholism. My father had given me literature and talked to me about the real possibility that there is a genetic component to alcoholism, but I never explored it any further. I always thought that I could stop, or slow down, or handle my drinking. And I didn't realize the profound effect alcoholism had on all aspects of my life, including shaping my own perception about how I was being affected by alcohol (basically clouding my perception so that I could not see the truth). My father died sober, before alcoholism took a hold of me in my professional life, so I was never able to talk with him about what was happening.

Upon my release from detox I was met by a LAP volunteer. He drove me home and suggested we meet later at an AA meeting. That evening I went to my first AA meeting outside of a hospital facility and I picked up a white poker chip, indicating my desire to stop drinking and to join AA. I had never been much of a "joiner." I always felt alone and isolated, different from everyone else, and

despite my accomplishments, somehow lesser than other people. But, as I became more familiar with what it meant to be in a group of people all trying to get well, I felt wholly and completely a part of a group for the first time in my life. In this journey of recovery I have met people who have said things out loud—things that I had always thought I alone felt. I thought I was unique and that my problems were unique. It turned out that I was just a run-of-the-mill alcoholic. Regardless of whether I was speaking with other lawyers, or doctors, or construction workers, people living in mansions, or homeless people, I found that I had more in common with a person struggling with or recovering from alcoholism than I had with people I had known for years.

Going to recovery meetings and going to intensive outpatient treatment were part of the after-care of detox, and part of the suggestions given to me by the LAP. My actions and inactions that lead to grievances being filed resulted in a suspension of my law license. That suspension was stayed pursuant to an agreement whereby I would fix my trust accounting deficiencies, and I would abide by the terms of a contract with the LAP. Those terms included successfully completing outpatient treatment, further counseling to assist in preventing relapse, random drug testing, and regularly participating in recovery peer support. That contact lasted for three years, the end of which occurred nearly eight years ago.

Since the end of that contract I have been under no obligation to attend support meetings. Rather than an obligation, it is now a privilege. Treatment and participation in AA gave me another shot at life. Before recovery, although surrounded by a loving family and friends, I felt alone. I now realize I was living my life in fear. I was imprisoned by alcoholism. A slave to it.

Recovery has freed me. It has showed me how to live a full and complete life. I have learned to fully participate in life. I am a better person, a better husband, a better father, and a better friend. I am a better lawyer because of my recovery. Today, I really feel privileged that I am in a position to assist people who desperately need help. Most of my clients have the whole system working against them, and I am at least one person who is on their side. I am able to fully commit to engage on their behalf. Each day I show up with a positive outlook, ready to do my part and what I can in a case, knowing I have done my best. I have also

noticed that younger lawyers seek my opinions and advice on legal matters, although I suspect that has as much to do with my gray hair as anything else. But I am glad to help them the way I was helped as a young lawyer. Learning the principles of recovery has taught me how to set aside my own egoism and seek to be of service to others, not just clients. Having evolved from someone hiding in my office—scared to even look others in the eye—to being an enthusiastic participant in life, is truly a miracle.

In recovery these sorts of miracles occur every day. I didn't grow up wanting to be an alcoholic. I didn't grow up wanting to be a lawyer. Having found myself being both, I was

lucky to be in North Carolina. The Lawyers Assistance Program of the NC State Bar has a rich tradition and history of saving lawyers. It helped save my life physically, professionally, and spiritually. If anyone reading this feels like there is no hope, like you are beyond redemption, like you are undeserving of a second chance, like you are alone, please know this: There are people who understand. Those people are a phone call away. The LAP has volunteers throughout the state who are willing to lend help with no questions asked, no commitment required. All that is required is a sliver of willingness to want your life to be different. The only requirement for the assistance of the LAP is a phone call. ■

If you wish to contact the author, send your message to Robynn Moraites at robynn-moraites@gmail.com and it will be forwarded.

The North Carolina Lawyer Assistance Program is a confidential program of assistance for all North Carolina lawyers which helps lawyers address problems of stress, depression, addiction, or other problems that may lead to impairing a lawyer's ability to practice. If you are a North Carolina lawyer, judge, or law student and would like more information, go to www.nclap.org or call toll free: Robynn Moraites (for Charlotte and areas west) at 1-800-720-7257, Towanda Garner (in the Piedmont area) at 1-877-570-0991, or Ed Ward (for Raleigh and down east) at 1-877-627-3743.

Gideon (cont.)

and responsible criticism of this system. This criticism may be summed up under the following headings:

1. In many instances the appointed attorney does not have sufficient time nor investigative resources to prepare adequately for trial.
2. In many cases young and inexperienced lawyers are appointed to represent indigent defendants, and in other cases lawyers who are busy with civil practice and have no experience in trying criminal cases are appointed.
3. Under the assigned counsel system it is particularly difficult to get attorneys appointed to represent indigent defendants before the presiding judge arrives to open court. This makes necessary the determination of indigency, the assignment of counsel, and in many instances the continuing of cases after a particular term of court is opened. The corresponding loss of the court's time adds up to considerable expense.
4. Under the assigned counsel system the indigent defendant often must remain in jail for longer periods of time, thereby increasing the expense of the counties or municipalities for maintaining and operating jails.

* * * * *

With respect to the method that would provide an economical and efficient man-

ner of providing counsel for the indigent in North Carolina, the committee found it difficult to arrive at any comparative cost figures between the two simply because of the fact that there are at present no public defender offices in North Carolina. Under the present assigned counsel system during the year beginning July 1, 1963, and ending on June 30, 1964, 3,003 indigent defendants appeared in the separate superior courts. The cost was \$238,956. It should be pointed out, however, that these cases included only felony charges, that in many cases the fees paid were grossly inadequate, and that the cost figures do not include any post-conviction hearings. Also, the committee takes note of the fact that the administrative assistant to the chief justice of the North Carolina Supreme Court in remarks made at the October 1964 meeting of the North Carolina State Bar reported that during the first 15 weeks of the current year appointments made under the assigned counsel system were up 78% over the same period last year, and that payments to assigned counsel increased 105%.

* * * * *

The committee feels that while a public defender system may cost more initially than the present assigned counsel system, that as the state grows in population and that as the principle set forth in *Gideon v. Wainwright* is extended to cover cases other than felony cases, the public defender system will be more economical to operate.

As far as efficiency is concerned the committee is convinced that counsel for the indigent can be more efficiently provided by a uniform statewide public defender system.

The committee ultimately released the report in 1965 and recommended the creation of a public defender system. A state-wide system of public defenders, of course, was never created. The legislature instead has created individual public defender offices in areas where it was believed that the office would serve the local system. The first office was created in Guilford County, and the first chief public defender was appointed by the governor in 1970. Wallace Harrelson served as chief public defender from his appointment until his death in 2011.

North Carolina has made great strides in providing counsel for indigent defendants, and in managing the resources required to provide representation. In 2001 the Office of Indigent Defense Services (IDS) began operation, proving a mechanism for creating and implementing policies that govern indigent representation. IDS now serves to manage the resources needed to provide representation in well over 200,000 cases a year, and provides oversight to the 16 local public defenders and three statewide defender offices, as well as the thousands of attorneys willing to take appointed cases. While many of the problems highlighted in the 1965 report remain—including the inadequate fees in many cases—we have come a long way since *Gideon*. ■

Thomas K. Maher is the executive director of the North Carolina Office of Indigent Services.

Income Picture Remains Bleak Though New Sources of Income Assist

Income

All IOLTA income earned in 2011 is not yet calculated. However, we can report that the income picture remains bleak. As projected, the income increase from comparability (which was implemented beginning July 2010) continued through the first two quarters of 2011. Then, income not only leveled off, but declined somewhat. We saw a 9% decline in the third quarter. We are still hopeful that we will meet last year's income total, which was just over \$2.2 million.

Income for 2011 is bolstered by the \$100,000 donation to NC IOLTA from the Paralegal Certification Program. Unlike many IOLTA programs, NC IOLTA is not part of a bar foundation that engages in fund-raising. Therefore, this gift is unusual and very much appreciated in these difficult times.

Grants

Beginning with the 2010 grants, we have limited our grant-making to a core group of (mainly) legal aid providers. Even with that restriction and using \$1 million in reserve funds in each of the last two years, grants have dramatically decreased (by approximately 20% in 2010 and 11% in 2011). Faced with a smaller reserve fund (~\$800,000) and projections that interest rates will remain low for some time, the NC IOLTA trustees decided to use between one third and one half of the remaining reserve fund, and decrease grants by 15% in order to make just over \$2.3 million in grants for 2012.

Cy Pres Funds

Since 2007 we have received just over \$50,000 from class action residual funds in accordance with the provisions of the NC statute that sets out a procedure by which the court enters an order directing payment of the unpaid residue from class action settlements to be divided equally to the Indigent Person's Attorney Fund and to the North Carolina State Bar for the provision of civil legal services for indigents. The State Bar has asked IOLTA

to administer the funds it receives.

Many states have seen significant funds generated from cy pres awards and/or from settlement awards. The Equal Access to Justice Commission (EAJC) hopes to educate lawyers and judges about the statute and other methods for sending settlement funds to legal aid. We hope to have a brief cy pres manual available soon, which will be posted on the EAJC website and accessible through the NC IOLTA website.

State Funds

In addition to its own funds, NC IOLTA administers the state funding for legal aid on behalf of the NC State Bar. For the 2010 calendar year, we administered just over \$5 million. For the 2011 calendar year we administered \$4.4 million.

Settlement Agent Accounts Added to NC IOLTA

An amendment to the Good Funds Settlement Act (N.C. Gen. Stat. 45A-9) requires that interest bearing trust and escrow accounts of settlement agents handling closing and loan funds be set up as IOLTA accounts, and directed the NC State Bar to adopt rules to administer such accounts. Revisions to the NC IOLTA rules were approved by the State Bar Council at its October meeting and will



be submitted to the NC Supreme Court for final approval. It seems that many of these accounts are not interest bearing and are not being set up as IOLTA accounts. In reviewing reports through the end of November we have, however, identified 19 new accounts as settlement agent accounts. We expect that there will be more such accounts in the December and January reports as the requirement was effective on January 1, 2012. ■

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Profiles in Specialization—Michelle Connell

AN INTERVIEW BY DENISE MULLEN, ASSISTANT DIRECTOR OF LEGAL SPECIALIZATION

I recently met with Michelle Connell, a board certified specialist practicing in Winston-Salem and Raleigh, and talked with her about certification in family law and the recent addition to her credentials of a second certification in appellate practice. Michelle attended the University of North Carolina-Chapel Hill for her undergraduate degree—a Bachelor of Arts in English and Psychology—and Wake Forest Law School. Following law school she worked for Womble Carlyle handling a variety of cases. After a short break to start a family, Michelle worked with Legal Aid, and then began a full-time family law practice with Robinson and Lawing. She is now leading Cranfill, Sumner and Hartzog's venture into family law as a new practice area for the firm. Michelle became a board certified specialist in family law in 2009, and added a certification in appellate practice in 2011.

Q: Why did you pursue certification?

By that time (2009) my practice was entirely comprised of family law and family law appeals. I was chair of the Family Law Section of the Bar Association and felt that, particularly in that role, I needed the certification. For family lawyers, board certification is an expected part of your legal career, so I knew I was headed in that direction. This past year when the appellate practice certification became available, I was excited. Appellate work is really my passion, and to have the chance to become certified in both of my practice areas was such a great opportunity that I didn't hesitate.

Q: How did you prepare for the examinations?

For both exams I studied a lot. For the family law exam, I see most of those issues every day; however, there are some, like

adoption, that I don't typically handle, so I made sure to focus some of my study time specifically on those statutes. For the appellate practice exam, I completed the continuing legal education (CLE) course entitled "Improving Your Appellate Practice: Gateway to Specialization" and used the content covered to guide my study. The program was excellent and really reinforced my dedication to appellate practice. Beyond that, I focused on the Fourth Circuit Rules since I hadn't handled one of those cases in years.

Q: Was the certification process valuable to you in any way?

The preparation was invaluable. As I read the statutes and rules, I had many moments of insight

when I read something that enabled me to connect information in a new way. It was a very enlightening process. I also enjoyed pulling together the information about previous cases, oral arguments and briefs for my application. I enjoyed reliving some of those cases and seeing how my career had taken shape over time. I did make a point of contacting each of my references before I turned in my application to make sure they felt comfortable recommending me. It was gratifying to hear that they did!

Q: Has certification been helpful to your practice?

Certification has helped my family law practice in quite a few ways. I've noticed that other lawyers and judges expect the specialists to be knowledgeable, prepared, and reasonable. That shared expectation helps everything run more smoothly. The appellate practice certification is new, so I've only just begun to see its impact. I have already gotten several calls from prospective clients who saw that I am now certified. Clients are quite savvy now and do their research before mak-

ing contact.

Q: Who are your best referral sources?

Definitely other attorneys. We all use the directory of certified specialists (nclawspecialists.gov/search.asp) to make referrals. It's the first thing I pull up when I need to refer a client. Certification is a shorthand way of showing your experience; a way to signal to others "this is what I do." The directory is a great resource and a very useful client development tool.

Q: How does your certification benefit your clients?

The CLE requirements to maintain certification include taking courses specifically in your specialty area. Meeting those requirements ensures that I am up to date on case law and other changes and trends. This has been a real benefit to my clients and helps them know that they can count on my knowledge and legal advice.

Q: Are there any hot topics in family law now?

Family law is relatively calm right now. We do have some proposed legislation concerning family law appeals that should address issues we've had with interlocutory appeals in the past. Jonathan McGirt (who is the only other North Carolina lawyer to be board certified in both family law and appellate practice) and I were able to play a large role in leading this effort. We hope to see the changes in 2013.

Q: How do you stay current in your field?

I read all of the appellate opinions and participate in a wealth of communication among family law specialists in North Carolina. The family law bar is an extremely knowledgeable and generous group of lawyers. I can send a message to a colleague asking a question or expressing a concern and receive a quick, thoughtful, and helpful response. It's nice to be able to count on each other, and that helps keep us all up to date.

Q: Is certification important in your practice area?

Certification is a step past important in



family law now. If your goal is to practice family law and you want to handle complex cases, you need to seek board certification. It has become an important expectation of judges, and has really helped raise the level of our practice throughout the state.

Q: How does certification benefit the public?

It provides a great way for prospective clients to know our credentials. If a client is contacting a certified specialist, he or she knows that the lawyer has a great deal of experience handling similar matters. The rates may be higher, but it can take half the time to complete the work and save money for the client in the long run. In family law

and criminal law particularly, clients are paying out of pocket for these services, so it is in their best interest to work with a lawyer who can be both expedient and accurate.

Q: How does certification benefit the profession?

The certification program benefits lawyers in a couple of ways. First, it makes the public aware that the State Bar is providing additional oversight in this particular area of the law. That gives the public some comfort in selecting a lawyer, particularly a board certified lawyer. The program also offers lawyers the luxury of limiting our practices. And it's really nice to have the perceived "ok" from the State Bar as well. Once I became a board certified specialist in family law, I noticed that people stopped asking me questions about their real estate closings and wills. I enjoy the lack of pressure to handle matters about which I am unfamiliar.

Q: How do you see the future of legal specialization?

Similar to the medical profession, it's the way of the future. It's great to have a primary physician, but sometimes you need a specialist. That's true within the legal profession as well. There are many instances where the legal issues are so complex that the client really needs a specialist.

Q: What would you say to encourage other lawyers to pursue certification?

I would definitely encourage other lawyers to specialize and to become board certified. It's important to take the time to assess your practice and focus on what you really want to do. Make the effort, prepare for the exam, sharpen your knowledge, and prove to yourself that you are a specialist. ■

For more information on the State Bar's specialization programs, please visit us on the web at nclawspecialists.gov.

Congratulations to the Newest Specialists

The following lawyers met all of the certification requirements, and were certified by the North Carolina State Bar Board of Legal Specialization on November 21, 2011.

Appellate

Christopher Browning Jr., Raleigh
John D. Bryson,* High Point
Michelle Connell, Raleigh
Lisa S. Costner,* Winston-Salem
Honorable Robert H. Edmunds Jr.,* Raleigh
Honorable James Exum, Raleigh
J. Clark Fischer,* Winston-Salem
Judge Martha Geer, Raleigh
Tobias Hampson, Raleigh
Geoffrey W. Hosford,* Wilmington
John Korzen, Winston-Salem
John Maddrey, Raleigh
J. Matthew Martin,* Asheville
Jonathan McGirt, Raleigh
Honorable Burley Mitchell, Raleigh
Jeffrey E. Noecker,* Wilmington
Preston Odom, Charlotte
Frank Queen, Waynesville
Leslie Rawls, Charlotte
Douglas Ruley, Leichester
Matthew Sawchak, Raleigh
Elizabeth Scherer, Raleigh

*Transitioned from criminal appellate specialty

Criminal Law

Rosemary Godwin, Raleigh (State & Federal)
Michael Greene, Charlotte (State)
Andrew McCoppin, Cary (Federal)
Robert McClellan, Greensboro (State & Federal)
Daniel Roberts, Charlotte (State)
Stacey Rubain, Winston-Salem (State)
James Rutherford, Wilmington (State)

Estate Planning

John King, New Bern
Pamela Silverman, Charlotte
Mary Skinner, New Bern
Matthew Thompson, Wilmington

Family Law

Catherine Bailey, Raleigh
Judith Daly, Statesville
Teresa Davis, Cary
Christine Eatmon, Wake Forest
Amy Edwards, Greenville
Susan Goetcheus, Raleigh
Kara Helms, Winston-Salem
Kathy Holmes, Raleigh
Stephanie Jenkins, Raleigh
Barri Payne, Durham
Regina Sutherland, Raeford
Leslie VanDerHave, Greenville

Immigration Law

Heather Ziemba, Charlotte
Helen Jugovic, Wilmington

Real Property Law

Benjamin Ellis, Charlotte (Commercial)
John Kiser, Greensboro (Commercial)

Social Security

Kevin Morton, Winston-Salem
Amelia Patton, Elkin
Jennifer Taylor, Raleigh

Workers' Compensation

Michael Bertics, Raleigh
Matthew Healey, Raleigh
Jennifer Jones, Raleigh
April Seguin, Raleigh
Adam Smith, Cary
William Wallace, Charlotte
Cameron Wesley, Charlotte
Robert Whitley, New Bern

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Disbarments

Lisa B. Arnold of Cary misappropriated entrusted funds exceeding \$18,000. She was disbarred by the Disciplinary Hearing Commission.

Billy D. Friende of Winston-Salem misappropriated entrusted funds exceeding \$31,000 from an estate. He surrendered his law license and was disbarred by the DHC.

Willis H. Harper Jr. of Whiteville misappropriated entrusted funds exceeding \$175,000. He surrendered his law license and was disbarred by the State Bar Council.

Winston-Salem lawyer **Todd Peebles** surrendered his law license and was disbarred by the Wake County Superior Court. Peebles admitted that he misappropriated entrusted funds totaling \$262,851.21.

Benjamin Viloski of Oak Island was convicted of felony offenses including conspiracy to commit mail and wire fraud, mail fraud, conspiracy to commit money laundering and transactions in criminally derived property, aiding and abetting concealment of money laundering, aiding and abetting transactions in criminally derived property, and making false statements to federal agents. Viloski surrendered his law license and was disbarred by the DHC.

Edward Zotian of Winston-Salem was suspended for five years in 2004. In 2006 the DHC found that Zotian practiced law during the 2004 suspension and suspended him for an additional five years, to commence at the end of the 2004 suspension. In 11 DHC 7 the DHC found that Zotian continued to practice law during the 2004 and 2006 suspensions, and that he misrepresented to a "client" that he was providing legal services under the supervision of a lawyer. He was disbarred.

Suspensions & Stayed Suspensions

William Anthony and Edgar Bogle, both of Gastonia, did not follow proper trust accounting procedures and had a history of such non-compliance. The DHC suspended both lawyers for two years. The suspensions are stayed for three years upon each lawyer's

compliance with numerous conditions.

Raleigh lawyer and former governor **Michael Easley** pled guilty to one count of certifying a false campaign finance report, a felony. The DHC suspended him for two years. Easley will receive credit for one year spent on interim suspension.

Fayetteville lawyer **Laura Johnson** did not promptly pay a title insurance premium and did not follow proper trust accounting procedures. The DHC suspended her for two years. The suspension is stayed for three years upon her compliance with numerous conditions.

Gary Kivett of Spruce Pine made unwanted sexual advances to multiple clients. The DHC suspended Kivett for four years. After serving one year active suspension, he may apply for a stay of the balance upon his compliance with numerous conditions, including providing certifications from two psychiatrists or psychologists who specialize in treating sexual offenders that, based upon their independent comprehensive evaluations, in their professional opinions Kivett does not suffer from any condition creating a predisposition for inappropriate sexual behavior and does not suffer from any mental, psychological, or emotional condition that significantly impairs his professional judgment, performance, or competence.

Randolph E. Shelton Jr. of Moore County took fees from an estate without approval of the clerk of court, did not fulfill his duties as personal representative for which he was held in contempt, did not follow proper trust accounting procedures, and did not respond to the State Bar. He was suspended for three years. After serving 18 months active suspension he may seek a stay of the balance upon proving compliance with numerous conditions.

Deborah Williams of Wilmington did not follow proper trust accounting procedures. The DHC suspended her for one year. The suspension is stayed for three years upon her compliance with numerous conditions.

Show Cause Orders

The DHC activated a three-year suspen-

sion of the law license of Fayetteville lawyer **Susan E. Hyatt**. Hyatt did not comply with the conditions contained in a 2008 DHC order, including that she did not follow proper trust accounting procedures. After six months Hyatt may seek a stay of the balance of the suspension if she proves compliance with all conditions contained in the original order and in the activation order.

Interim Suspensions

The DHC entered an order of interim suspension in the case of **Russell F. Crump** of Newberry, Florida. On September 28, 2011, Crump entered a plea of *nolo contendere* to one count of child abuse, a third-degree felony.

Censures

Valderia D. Brunson of Creedmoor was censured by the Grievance Committee. Brunson was the closing lawyer for a real estate transaction in which the seller defrauded the buyer. Although she was unaware of the seller's scheme, Brunson communicated with her client—the buyer—exclusively through the seller, which allowed the seller to orchestrate the fraud. Brunson also did not recognize that the property was in foreclosure, and did not have documents properly executed.

Joseph H. Plummer of Concord was censured by the Grievance Committee for having a sexual relationship with a client. Plummer attempted to mitigate the harm by ending the relationship and finding alternate legal counsel to represent the client.

Tamla Scott of Washington, DC, was censured by the Grievance Committee. Scott did not disclose a pending grievance and three unresolved fee disputes on her application to the District of Columbia Bar, and made a false statement to DC Bar Counsel.

Reprimands

K. Douglas Barfield of Fayetteville was reprimanded by the Grievance Committee. He did not adequately supervise a non-lawyer assistant in his real estate practice, did not adequately communicate, and did not timely

cancel a deed of trust.

Rodney C. Mason of Asheboro was reprimanded by the Grievance Committee. He violated a local rule of practice that required him to notify opposing counsel of a missed deadline and give opposing counsel reasonable time to respond.

Frederick J. Owens of Wilmington was reprimanded by the Grievance Committee. Owens did not cooperate with the judicial district bar's investigation of a grievance filed against him.

Robert R. Schoch of High Point was reprimanded by the DHC. He meddled in a criminal case in which the defendant was represented by counsel, disrupted those proceedings, interfered with the attorney-client rela-

tionship, and violated the court's orders to turn over his file and have no further contact with the case.

Roderick M. Wright of Charlotte was reprimanded by the Grievance Committee. Wright did not supervise an independent contractor hired to design his law firm website. The contractor developed a site almost identical to another firm's website. Wright did not review the content of the website for several years.

Transfers to Disability Inactive Status

William Kenneth Hinton of Smithfield, **Heather Anne Shade** of Fairview, and **Ralph B. Strickland** of Fayetteville were transferred to disability inactive status by the chair of the

Grievance Committee.

Reinstatements

The secretary entered an order reinstating **Garey M. Ballance** of Knightdale from suspension.

The secretary entered an order staying the remaining 18 months of the original two-year suspension of Raleigh lawyer **John Kirby**. Kirby must remain in compliance with the conditions of the original order of discipline.

The DHC entered an order reinstating **Mohammed M. Shyllon** of Cary from suspension. However, the DHC also imposed an additional one-year suspension, stayed for three years upon Shyllon's compliance with numerous conditions. ■

LAMP Committee (cont.)

about 50 attorneys in all sections of the state. The problem, however, was continually updating and maintaining the list, as well as distributing paper copies to legal assistance offices more than once a year at the NC LAMP conferences. The work of the committee—then as now—was done by two or three members; it had no staff at the State Bar and was entirely dependent on the work of volunteers. The committee's work was done in the civilian law offices of its members.

Eventually this project faded and was discontinued (mainly for the above reasons). Its successor on a national level still exists, however. The Family Law Section of the American Bar Association (ABA) created an "Operation Stand-By" in 2001, and volunteers from every state flocked to join in the effort to answer the call from the military's legal assistance attorneys, from Germany, to Japan, to Georgia.

In 1986 I turned over the reins of director to Dale Talbert, an air force reservist who worked in the Attorney General's Office, as I assumed the position of chairman of the ABA's own Standing Committee on LAMP. Mr. Talbert was followed by Whiteville attorney Charles Ingram (a navy reservist in private practice), then the late Paul Raisig (a retired army artillery colonel who practiced in Fayetteville), and the current director Gill Beck, an army reserve brigadier general who works in the US Attorney's Office for the Middle District of North Carolina.

Enter the Internet

By the mid-1990s it was obvious that Internet resources were the wave of the future. The committee could no longer depend on mailing out copies of the TAKE-1s and Co-Counsel Bulletins for local duplication. One of the committee members, By Shields, volunteered to be the "webmaster" in charge of gathering and posting content for a LAMP Internet presence. A retired army lieutenant colonel, Shields was the staff judge advocate of the 82d Airborne Division before he went into private practice and, eventually, joined the Attorney General's Office.

Under Shields' direction, the committee created the architecture and content for the very popular website nclamp.gov. Found at this URL are current info-letters, names of the committee's members, and resources from the NC School of Government, all of which can help the legal assistance attorney. There is a link to the membership directory of the NC Bar Association's Family Law Section to facilitate referrals. All of the materials for CLE programs back to 2004 are also found on the website, which means that invaluable manuscripts on eviction, consumer protection, legal ethics, traffic citations, housing, the Servicemembers Civil Relief Act, and other matters are within easy reach of the legal assistance attorney. There is no website of a state bar or bar association military committee that contains a wider list of handouts, contacts, and resources for the lawyer and the client.

The Torch is Passed

Judge Everett died in July 2009, and

Statesville practitioner David Benbow took over as the chair of the LAMP Committee. Benbow served in the United States Army with the 2nd Infantry Division in the DMZ of Korea in 1968 and 1969. He presides over a large and robust collection of committee members, including all of the base staff judge advocates in North Carolina who are *ex officio* members of the committee. For the last ten years the committee has stayed organized through the minutes and agendas prepared by Michael Archer, a retired marine corps major and currently the chief of legal assistance at the SJA Office, Camp Lejeune. Archer is a nationally-known expert on all aspects of consumer protection and debt financing.

Under the direction of Benbow, Archer and Beck, the NC LAMP Committee has continued to grow and increase its benefits for those who provide legal services to military personnel and their family members. Their leadership, and that provided by the late Judge Everett, is the reason that the ABA LAMP Committee has cited the NC LAMP Committee as "second to none nationwide in its commitment and accomplishments in giving help to lawyers in uniform and their clients." ■

Mr. Sullivan, a retired army reserve JAG colonel, practices family law in Raleigh, and is the author of The Military Divorce Handbook (Am. Bar Assn., 2nd Ed. 2011). He has been a board certified specialist in family law since 1989. He can be reached at 919-832-8507 or mark.sullivan@ncfamilylaw.com.

Proposed Inactive Status for Certain NCCPs Will Help to Keep the Program Strong

BY TAMMY MOLDOVAN, NCCP

The Plan for Certification of Paralegals (Plan) was adopted in October 2004. The Plan has been tweaked since its initial adoption, but its purpose has remained steadfast. The purpose of the Plan “is to assist in the delivery of legal services to the public by identifying individuals who are qualified by education and training and have demonstrated knowledge, skill, and proficiency to perform substantive legal work under the direction and supervision of a licensed lawyer, and including any individual who may be otherwise authorized by applicable state or federal law to provide legal services directly to the public; and to improve the competency of those individuals by establishing mandatory continuing legal education and other requirements of certification.”

Implementing that purpose includes taking into account real world scenarios that might impact a North Carolina Certified Paralegal’s (NCCP) ability to maintain their certification. These issues include financial hardship, illness, disability, or active military duty for the paralegal or his or her spouse. When the Plan was initially created it did not include a provision for a status other than “active” for certified paralegals. This issue has come to the board’s attention over the last few years, and the board now believes it is important to add a provision to the Plan that would allow those NCCPs who have qualified for and maintained their certification as NCCPs to move to an “inactive” status for the above-mentioned reasons.

NCCPs who earn their certification have proven that they are qualified by education and training to perform supervised substantive legal work. They have either proven this through experience (if certified under the grandfathering provision) or through testing (if certified after the grandfathering provision), and they have maintained their certification as required under the Plan. Unfortunately, under the current provisions of

the Plan, there is no mechanism to become inactive. When certification lapses for any reason (including financial hardship, illness, disability, or active military duty for the paralegal or their spouse), if the paralegal wishes to become certified again, he or she will have to reapply for certification, pay the fee, and sit for the exam. For many NCCPs this also includes obtaining a paralegal degree to meet the education requirement for exam admission.

The proposed amendment to the Plan (found on page 53 of this *Journal*) creates an inactive status, which addresses the gap that currently exists for competent NCCPs to avoid the loss of their certification. The proposed amendment would allow a NCCP to petition the board for inactive status based on financial hardship, illness, disability, or active military duty for the paralegal or his or her spouse. This inactive status, if approved by the board, would last for a one-year period, with the requirement that the paralegal either petition the board to remain inactive each year, or file a renewal application to seek reinstatement to active status. Under the proposed amendment to the Plan, the paralegal would be allowed to remain on inactive status for up to five years.

During the inactive period, the paralegal cannot represent that he or she is a NCCP or use any of the other designations for certification set forth in the Plan. The paralegal would also not have to pay the renewal fee or complete the required continuing education. The inactive status is only valid for one year. Therefore, a paralegal on inactive status must either petition for continued inactive status, or petition for reinstatement to active status every year prior to their renewal date. However, in order to be reinstated to active status, in addition to filing a renewal application, the paralegal will have to complete 12 hours of CPE—including two hours of ethics CPE—in the year prior to filing the petition

for reinstatement to active status. If the paralegal on inactive status fails to petition for reinstatement to active status or petition for continued inactive status prior to the annual renewal date, certification will lapse and the paralegal must reapply and comply with all the certification requirements of the Plan including taking the exam.

The NCCP program continues to be strong in North Carolina. There are currently have 4,251 certified paralegals. By allowing the NC State Bar to keep the NCCPs on its inactive rolls until they are prepared to become active again, the proposed amendment will avoid the loss of competent NCCPs who, due to life circumstances, cannot maintain their active status. Each certified paralegal helps to fulfill the Plan’s purpose and to support the legal profession in North Carolina. ■

Tammy Moldovan is a litigation paralegal at Vandevanter Black LLP in Raleigh, and is also a member of the Board of Paralegal Certification.

Please be sure to read the article on page 8 by Executive Director L. Thomas Lunsford II commending the philanthropic efforts of the Board of Paralegal Certification.

Mr. Tutt (cont.)

about Mr. Tutt can find his books in old bookstores and perhaps in the wonderful world of technology on the internet. They are a great read and no one can find a better role model than Ephraim Tutt, Atticus Finch notwithstanding. ■

G. Stevenson Cribfield is a former State Bar Councilor. After practicing law for 45 years he is now enjoying retirement.

Featured Artist—Jane Filer

My paintings are evolved from historical and prehistoric observations. They are my response to clues I have gathered from the most ancient to the most modern visual references available. Blending this with the relationship I have with my own existence, I create a fantastical story. The sense of story is used to provoke exciting aspects of being and existing in this amazing world.

Jane Filer spent her early years in San Jose, California. At the age of five, Filer began to paint with intense dedication. When she was 11, the family migrated to Western Australia, where Filer first became acquainted with the ethereal artwork of the aboriginal people. The mystical nature of this culture made a lasting impression.

After high school and in response to the encouragement of her aunt and godmother, Filer began her formal art education in Chicago and subsequently received a Bachelor of Fine Arts with honors from Southern Illinois University (SIU). As a senior, she received the Rickert-Ziebold Trust Award, the most prestigious award offered to graduating seniors by SIU's School of Art & Design.

Filer married and moved to North Carolina, where she earned a Master of Fine Arts from the University of North Carolina at Chapel Hill. Presently, Filer lives in a house that she and her husband built in the woods near Chapel Hill. Her love of the landscape, animals, and plant life that surround her are evident in her work.

In 2006, after teaching painting and drawing for 21 years at The ArtsCenter (TAC) in Carrboro, North Carolina, Filer retired to devote all of her time to painting. TAC subsequently named the painting studio in which she spent so much time spreading her contagious love for the visual arts in her honor. In 2010 Filer painted a 45 foot long mural for RDU International Airport. The painting, which hangs in the baggage claim area, is called

"Friendly Folks" and was commissioned by The Triangle Area Sister Cities of Durham, Raleigh, Cary, and Southern Pines to promote its mission of "world peace: one friendship and one community at a time."

Filer's work has been shown internationally at the American embassies in Estonia and Uganda, and appears in numerous prestigious corporate, commercial, and private collections including the collections of IBM, Duke Hospital, and UNC Memorial



Hospital. Filer enjoys a hearty following of art collectors and friends who attend her solo exhibitions. Many of her shows include "Happenings," a modern primal-drum dance of characters from her painting—friends and patrons wearing masks made by Filer—coming to life and roaming the gallery.

Filer's paintings continue to be inspired by a deep contemplation of life and her relationship to nature. ■

Each quarter the works of a different contemporary North Carolina artist are displayed in the storefront windows of the State Bar building. The State Bar is grateful to The Mahler Fine Art, the artists' representative, for arranging this loan program. The Mahler is a full-service fine art gallery in Raleigh representing national, regional, and North Carolina artists, and provides residential and commercial consulting. Readers who want to know more about an artist may contact owners Rory Parnell and Megg Rader at (919) 896-7503 or info@themahlerfineart.com.

Council Adopts Authorized Practice Opinion on the Role of Laypersons

Council Actions

At a meeting on January 27, 2012, upon the recommendation of the Executive Committee, the State Bar Council adopted a comprehensive revision of Authorized Practice Advisory Opinion 2002-1 (January 24, 2003). The revised opinion appears on the State Bar website.

Also at its meeting on January 27, 2012, the State Bar Council adopted the ethics opinions summarized below:

2009 Formal Ethics Opinion 7

Interviewing an Unrepresented Child Prosecuting Witness in a Criminal Case Alleging Physical or Sexual Abuse of the Child

Opinion rules that a criminal defense lawyer or a prosecutor may not interview an unrepresented child who is the alleged victim in a criminal case alleging physical or sexual abuse if the child is younger than the age of maturity as determined by the General Assembly for the purpose of an in-custody interrogation (currently age 14) unless the lawyer has the consent of a non-accused parent or guardian or a court order allows the lawyer to seek to interview the child without such consent; a lawyer may interview a child who is this age or older without such consent or authorization provided the lawyer complies with Rule 4.3, reasonably determines that the child is sufficiently mature to understand the lawyer's role and purpose, and avoids any conduct designed to coerce or intimidate the child.

2011 Formal Ethics Opinion 6

Subscribing to Software as a Service While Fulfilling the Duties of Confidentiality and Preservation of Client Property

Opinion rules that a law firm may contract with a vendor of software as a service provided the lawyer uses reasonable care to safeguard confidential client information.

2011 Formal Ethics Opinion 7

Using Online Banking to Manage a Trust Account

Opinion rules that a law firm may use

online banking to manage its trust accounts provided the firm's managing lawyers are regularly educated on the security risks and actively maintain end-user security.

2011 Formal Ethics Opinion 16

Responding to Ineffective Assistance of Counsel Claim Questioning Representation

Opinion rules that a criminal defense lawyer accused of ineffective assistance of counsel by a former client may share confidential client information with prosecutors to help establish a defense to the claim so long as the lawyer reasonably believes a response is necessary and the response is narrowly tailored to respond to the allegations.

Ethics Committee Actions

At its meeting on January 26, 2012, the Ethics Committee voted to publish four revised proposed opinions. The comments of readers are welcomed.

Proposed 2010 Formal Ethics Opinion 14

Use of Search Engine Company's Keyword Advertisements January 26, 2012

Proposed opinion rules that it is a violation of the Rules of Professional Conduct for a lawyer to select another lawyer's name as a keyword for use in an Internet search engine company's search-based advertising program.

Inquiry:

Attorney A participates in an Internet search engine company's search-based advertising program. The program allows advertisers to select specific words or phrases that should trigger their advertisements. An advertiser does not purchase the exclusive rights to specific words or phrases. Specific words or phrases can be selected by any number of advertisers.

One of the keywords selected by Attorney A for use in the search-based advertising program was the name of Attorney B, a compet-

Public Information

The Ethics Committee's meetings are public, and materials submitted for consideration are generally NOT held in confidence. Persons submitting requests for advice are cautioned that inquiries should not disclose client confidences or sensitive information that is not necessary to the resolution of the ethical questions presented.

ing lawyer in Attorney A's town with a similar practice. Attorney A's keyword advertisement caused a link to his website to be displayed on the search engine's search results page any time an Internet user searched for the term "Attorney B" using the search engine. Attorney A's advertisement may appear to the side of or above the unpaid search results, in an area designated for "ads" or "sponsored links."

Attorney B never authorized Attorney A's use of his name in connection with Attorney A's keyword advertisement, and the two lawyers have never formed any type of partnership or engaged in joint representation in any case.

Does Attorney A's selection of a competitor's name as a keyword for use in a search engine company's search-based advertising program violate the Rules of Professional Conduct?

Opinion:

Yes. It is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation. Rule 8.4(c). Dishonest conduct includes conduct that shows a lack of fairness or straightforwardness. *See In the Matter of Shorter*, 570 A.2d 760, 767-68 (DC App. 1990). The intentional purchase of the recognition asso-

ciated with one lawyer's name to direct consumers to a competing lawyer's website is neither fair nor straightforward. Therefore, it is a violation of Rule 8.4(c) for a lawyer to select another lawyer's name to be used in his own keyword advertising.

Proposed 2011 Formal Ethics

Opinion 4

Participation in Referral Arrangement

January 26, 2012

Proposed opinion rules that a lawyer may not agree to procure title insurance exclusively from a particular title insurance agency on every transaction referred to the lawyer by a person associated with the agency.

Inquiry #1:

Attorney has developed a good working relationship with Referring Party who, over time, has referred real estate closings to Attorney's office. Referring Party has some affiliation with Title Insurance Agency. Attorney desires to maintain this working relationship with Referring Party. As a condition of receiving further referrals, Referring Party asks that Attorney agree to procure title insurance exclusively from Title Insurance Agency on every transaction referred to Attorney by Referring Party. May Attorney agree to such a referral arrangement with Title Insurance Agency?

Opinion #1:

No. The ethical duties set forth in the Rules of Professional Conduct prohibit a lawyer from entering into an exclusive reciprocal referral agreement with any service provider. Such an arrangement impairs the lawyer's ability to provide independent professional judgment in violation of Rules 2.1 and 5.4(c). In addition, the arrangement amounts to improper compensation for referrals in violation of Rule 7.2(b). Finally, such an arrangement creates a nonconsentable conflict of interest between the lawyer and the client. *See* Rule 1.7.

In most real estate transactions, the client delegates the choice of title insurer to the lawyer, who is charged with acting in the best interest of the client. In determining what is in the best interests of the client, it is appropriate for the lawyer to consider among other things the fees charged for title insurance, the financial stability of the insurer and/or title insurance underwriter, the willingness of the title insurer to provide coverage regarding title

matters, and the ability of the insurer to meet the needs of the client with regard to the transaction.

The lawyer may also consider the lawyer's working relationship with a specific title insurer, particularly where the relationship may prove beneficial to the client. This is true even where the client has been referred to the lawyer by someone affiliated with the specific title insurer. The lawyer may, and should, strive to cultivate the types of business relationships and provide the quality of legal services that will encourage clients and other professionals to recommend the lawyer's services. What a lawyer cannot do, however, is permit a person who recommends the lawyer's services to direct or regulate the lawyer's professional judgment in rendering the legal services. *See* Rule 5.4(c).

If the client indicates a preference as to a particular title insurance company that the lawyer does not believe is the best selection for the client, the lawyer's role is to counsel the client so that the client may make an informed decision. Ultimately, the choice of the title insurer in a real estate transaction is in the province of the client acting in consultation with the lawyer.

Inquiry #2:

Upon becoming aware that another lawyer has agreed to procure title insurance exclusively from a title insurance agency on every transaction referred to the lawyer by someone associated with the title insurance company, is Attorney under an ethical obligation to report and refer the other lawyer's conduct to the State Bar?

Opinion #2:

Rule 8.3(a) requires a lawyer to inform the State Bar if the lawyer knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer. Attorney should communicate his concerns to the other lawyer and recommend that the lawyer contact the State Bar for an ethics opinion as to his continuing participation in what appears to be an improper referral arrangement. After this communication, if Attorney has knowledge that the lawyer has continued his participation in an improper referral arrangement, Attorney must report the lawyer to the State Bar.

Rules, Procedure, Comments

All opinions of the Ethics Committee are predicated upon the Rules of Professional Conduct as revised effective March 1, 2003, and thereafter amended, and referred to herein as the Rules of Professional Conduct (2003). The proposed opinions are issued pursuant to the "Procedures for Ruling on Questions of Legal Ethics." 27 N.C.A.C. ID, Sect. .0100. Any interested person or group may submit a written comment or request to be heard concerning a proposed opinion. Any comment or request should be directed to the Ethics Committee at PO Box 25908, Raleigh, NC 27611, by March 30, 2012.

Captions and Headnotes

A caption and a short description of each of the proposed opinions precedes the statement of the inquiry. The captions and descriptions are provided as research aids and are not official statements of the Ethics Committee or the council.

Proposed 2011 Formal Ethics

Opinion 11

Communication with Represented Party by Lawyer Who is the Opposing Party **January 26, 2012**

Proposed opinion rules that a lawyer who is a party in a lawsuit, whether pro se or represented by counsel, may communicate with the represented opposing party relative to the subject matter of the representation with the consent of the opposing party's lawyer.

Inquiry #1:

Attorney A owns rental property. When the tenant stopped making rent payments, Attorney A brought suit against the tenant. Attorney A is representing himself as the

plaintiff. The tenant is represented by Lawyer X. Attorney A would like to communicate directly with the tenant in an effort to settle the case. Lawyer X believes that Attorney A is prohibited by Rule 4.2 from communicating directly with the tenant unless Lawyer X consents to the communication. Rule 4.2 prohibits a lawyer from engaging in direct communications about a legal matter with a person who is represented in the matter unless the lawyer for that person consents.

May Attorney A communicate directly with the tenant to discuss the litigation and possible settlement?

Opinion #1:

Yes, with the consent of Lawyer X. Obtaining the consent of opposing counsel is a small burden in light of the protection provided to the client-lawyer relationship by the prohibition on direct communications in Rule 4.2. The rule does not require the consent of the lawyer to be in writing.

Rule 4.2(a) provides that “[d]uring the representation of a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.” The purposes of Rule 4.2 are: (1) to prevent lawyers from circumventing opposing counsel to obtain statements from adverse parties; (2) to protect the integrity of the client-lawyer relationship; (3) to prevent the inadvertent disclosure of privileged information; and (4) to facilitate settlement by channeling disputes through lawyers. *See* Rule 4.2, cmt.[1].

In *In re Discipline of J. Michael Schaefer*, 117 Nev. 496, 25 P.3d 191 (2001), the Nevada Supreme Court concluded that the purposes served by the rule against communicating with represented persons are equally present when a lawyer appears *pro se*. The Nevada Supreme Court noted that, “the lawyer still has an advantage over the average layperson, and the integrity of the relationship between the represented person and counsel is not entitled to less protection merely because the lawyer is appearing *pro se*.” *Id.* at ___, 25 P.3d at 199.

We agree with the reasoning of the Nevada Supreme Court. *Accord* DC Bar Legal Ethics Committee, Op. 258 (1995); Disciplinary Board of the Hawaii Supreme Court, Formal Op. 44 (2003).

Inquiry #2:

The facts are the same as in Inquiry #1 except that Attorney A is represented by Lawyer B.

May Attorney A communicate directly with the tenant to discuss the litigation including possible settlement?

Opinion #2:

Yes, with the consent of Lawyer X. Attorney A should inform Lawyer B of his desire to communicate directly with the tenant and the lawyers for both parties must agree on the scope and duration of any direct communications between the parties.

A direct communication by a lawyer regarding the subject of the litigation poses the same threats to the interests of the adverse party whether the lawyer is representing a client, proceeding *pro se*, or being represented by another lawyer. In each scenario, the lawyer may use his legal training to influence or intimidate the adverse party and to interfere with the client-lawyer relationship. Although Rule 4.2, by its own terms, applies only “[d]uring the representation of a client,” the prohibition on conduct that is prejudicial to the administration of justice in Rule 8.4(d) justifies the extension of the anti-contact rule to a lawyer/litigant who is represented by counsel.

This opinion overrules Ethics Decision 2000-8.

Inquiry #3:

Would the responses to Inquiry #1 or Inquiry #2 be different if both of the opposing parties were lawyers?

Opinion #3:

No.

Inquiry #4:

Would the responses to Inquiry #1 or Inquiry #2 be different if the communication was initiated by the opposing party rather than the lawyer/litigant?

Opinion #4:

No. A client cannot waive the protection provided by the rule. Comment [8] states, “The Rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom com-

munication is not permitted by this Rule.”

Inquiry #5:

Would the responses to Inquiry #1 and Inquiry #2 be different if Attorney A wants to communicate with the tenant prior to filing suit and Attorney A is aware that the tenant is represented on the lease matter by Lawyer X?

Opinion #5:

No. As noted in Comment [8], Rule 4.2 “applies to communications with any person, whether or not a party to a formal adjudicative proceeding, contract, or negotiation, who is represented by counsel concerning the matter to which the communication relates.”

Inquiry #6:

Rule 4.2(a) permits a lawyer “to encourage his or her client to discuss the subject of the representation with the opposing party in a good-faith attempt to resolve the controversy.”

Does this provision authorize direct communications with the tenant by Attorney A, whether Attorney A appears *pro se* or through counsel?

Opinion #6:

Yes, with the consent of Lawyer X.

Direct communication presents the same potential dangers, as described in Opinion #1, regardless of Attorney A’s motives. Requiring consent of the represented person’s lawyer helps to insure that the protection and benefits of representation are not lost.

Nevertheless, resolution of a client’s dispute should be facilitated whenever possible. The authority to deny consent should never be used to gain a tactical advantage by delaying a resolution and increasing the costs of litigation. When a lawyer is asked to consent to a direct communication with his or her client, the lawyer should behave reasonably and grant such requests whenever the interests of his or her client will not be harmed. Consent may be granted broadly and for a specified period of time (e.g., the duration of the matter) to facilitate direct communications between the parties if the lawyer deems beneficial to his or her client.

Inquiry #7:

May Attorney A communicate directly with the tenant in the absence of an express request by Lawyer X to refrain from communicating directly with his client?

CONTINUED ON PAGE 54

Amendments Pending Approval of the Supreme Court

At its meetings on October 21, 2011, and January 27, 2012, the council of the North Carolina State Bar voted to adopt the following rule amendments for transmission to the North Carolina Supreme Court for approval (for the complete text see the Fall and Winter 2011 editions of the *Journal* or visit the State Bar website):

Proposed Amendments to the Membership Rules

27 N.C.A.C. 1A, Section .0200, Membership—Annual Membership Fees

A new rule defining “good standing” is proposed. The proposed rule clarifies when a certificate of good standing will be issued to a member of the State Bar.

Proposed Amendments to the Administrative Reinstatement Rules

27 N.C.A.C. 1D, Section .0900, Procedures for Administrative Committee

The proposed amendments make a number of changes to the rules on reinstatement from inactive status and administrative suspension including the following: specify the effective date for the provisions approved by the Supreme Court in March 2011; define the compliance “year” as 365 day period (and not a calendar year); add payment of the judicial surcharge to the list of fees that must be paid for reinstatement; allow active

military service to offset the years of inactive status or suspension giving rise to the bar exam requirement for reinstatement; prohibit an inactive or suspended member whose petition is denied from petitioning for reinstatement until the next calendar year; specify that a lawyer who is inactive or suspended for seven years or more but active in another state must fulfill CLE requirements for reinstatement; and require payment of any delinquency shown on the financial records of the NC State Bar (including judicial district bar dues) and fulfillment of any delinquent administrative requirement (e.g., CLE hours, annual CLE report form, IOLTA certification) to qualify for reinstatement within 30 days of service of a suspension order.

Proposed Amendments to the Rules Governing IOLTA

27 N.C.A.C. 1D, Section .1300, Rules Governing the Administration of the Plan for Interest on Lawyers’ Trust Accounts (IOLTA)

The proposed amendments include the trust and escrow accounts of real estate settlement agents in the IOLTA program as required by N.C. Gen. Stat. 45A-9. Prior to adoption, the council approved a technical amendment to Rule .1319 to clarify that a North Carolina lawyer who serves as a settlement agent and uses an interest-bearing trust

or escrow account to receive and disburse closing funds must establish the account as an IOLTA account.

Proposed Amendments to The Plan of Legal Specialization

27 N.C.A.C. 1D, Section .1700, Minimum Standards for Certification of Specialists, and Section .2900, Certification Standards for the Elder Law Specialty

The proposed amendments clarify that the evaluation of a specialization applicant’s peer review information includes consideration of each peer reference’s practice experience in the specialty and relationship to the applicant. The proposed amendments also allow judicial service to satisfy the substantial involvement requirement for recertification, add juvenile delinquency criminal law and appellate practice to the list of specialties, and add “veterans’ benefits” to the list of course subjects that satisfy the CLE requirement for certification in elder law.

Proposed Amendment to the Rules on Prepaid Legal Services Plans

27 N.C.A.C. 1E, Section .0300, Rules Concerning Prepaid Legal Services Plans

The proposed amendment will make the initial and annual registration fees paid by prepaid legal services plans nonrefundable if the registration is denied or revoked.

Proposed Amendments

At its meeting on January 27, 2012, the Council voted to publish the following proposed rule amendments for comment from the members of the bar:

Proposed Amendments to the Procedures for Election of State Bar Councilors

27 N.C.A.C. 1A, Section .0800, Election and Appointment of State Bar Councilors

The proposed amendments permit judicial

district bars to adopt procedures for online voting for State Bar councilors as long as the procedures provide for appropriate notice, ensure secure voting, and offer access to ballots to all active members in the judicial districts.

.0804 Procedures Governing Elections by Mail

(a) Judicial district bars may adopt bylaws permitting elections by mail, in accordance with procedures approved by the N.C. State

Bar Council and as set out in this section.

...
(f) Only original ballots will be accepted. No photocopied or faxed ballots will be accepted. ~~Voting by computer or electronic mail will not be permitted.~~

.0805 Procedures Governing Elections by Electronic Vote

(a) Judicial district bars may adopt bylaws permitting elections by electronic vote in

accordance with procedures approved by the N.C. State Bar Council and as set out in this section.

(b) Only active members of the judicial district bar may participate in elections conducted by electronic vote.

(c) In districts which permit elections by electronic vote, the notice sent to members referred to in Rule .0802(e) of this subchapter shall advise that the election will be held by electronic vote and shall identify how and to whom nominations may be made before the election. The notice shall explain when the ballot will be available, how to access the ballot, and the method for voting online. The notice shall also list locations where computers will be available for active members to access the online ballot in the event they do not have personal online access.

(d) Write-in candidates shall be permitted and the instructions shall so state.

(e) Online balloting procedures must ensure that only one vote is cast per active member of the judicial district bar and that all members have access to a ballot.

~~.0805~~ .0806 Vacancies
[rule is unchanged]

~~.0806~~ .0807 Bylaws Providing for Geographical Rotation or Division of Representation
[rule is unchanged]

Proposed Amendments to the Administrative and CLE Suspension Rules

27 N.C.A.C. 1D, Section .0900, Procedures for Administrative Committee, and Section .1500, Rules Governing the Administration of the Continuing Legal Education Program

The proposed amendments will facilitate the service of both notices to show cause (NSC) for failure to fulfill a membership or CLE requirement and suspension orders for the same conduct by allowing for service of a NSC by designated delivery service (e.g., Federal Express) and for acknowledgement of service of a NSC by email. They also allow for a suspension order to be served by mailing the order to the last address on file with the State Bar if, after due diligence, the member cannot be served by registered/certified mail, designated delivery service, or personal service. The proposed amendments clarify that a written response to a NSC must "show cause" for not

suspending the member rather than merely provide an explanation for the failure to fulfill an obligation of membership.

.0903 Suspension for Failure to Fulfill Obligations of Membership

(a) Procedure for Enforcement of Obligations of Membership

....

(b) Notice

Whenever it appears that a member has failed to comply, in a timely fashion, with an obligation of membership in the State Bar as established by the administrative rules of the State Bar or by statute, the secretary shall prepare a written notice directing the member to show cause, in writing, within 30 days of the date of service of the notice why he or she should not be suspended from the practice of law.

(c) Service of the Notice

The notice shall be served on the member by mailing a copy thereof by registered or certified mail or designated delivery service (such as Federal Express or UPS), return receipt requested, to the last known address of the member ~~according to~~ contained in the records of the North Carolina State Bar or such later address as may be known to the person ~~effecting the attempting~~ service. ~~Notice~~ Service of the notice may also be accomplished by (i) personal service by a State Bar investigator or ~~by any other~~ person authorized by Rule 4 of the North Carolina Rules of Civil Procedure to serve process, or (ii) email sent to the email address of the member contained in the records of the North Carolina State Bar if the member sends an email from that same email address to the State Bar acknowledging such service.

(d) Entry of Order of Suspension upon Failure to Respond to Notice to Show Cause.

Whenever a member fails to ~~respond~~ show cause in writing within 30 days of the service of the notice to show cause upon the member, and it appears that the member has failed to comply with an obligation of membership in the State Bar as established by the administrative rules of the State Bar or by statute, the council may enter an order suspending the member from the practice of law. The order shall be effective 30 days after proof of service on the member. The order shall be served on the member by mailing a copy thereof by registered or certified mail or designated delivery service, return receipt requested, to the last known address of the member ~~according to~~

The Process

Proposed amendments to the Rules of the North Carolina State Bar are published for comment in the *Journal*. They are considered for adoption by the council at the succeeding quarterly meeting. If adopted, they are submitted to the North Carolina Supreme Court for approval. Amendments become effective upon approval by the court. **Unless otherwise noted, proposed additions to rules are printed in bold and underlined, deletions are interlined.**

Comments

The State Bar welcomes your comments regarding proposed amendments to the rules. Please send your written comments to L. Thomas Lunsford II, The North Carolina State Bar, PO Box 25908, Raleigh, NC 27611.

contained in the records of the North Carolina State Bar or such later address as may be known to the person ~~effecting the attempting~~ service. ~~Notice~~ Service of the order may also be accomplished by (i) personal service by a State Bar investigator or ~~by any other~~ person authorized by Rule 4 of the North Carolina Rules of Civil Procedure to serve process, or (ii) email sent to the email address of the member contained in the records of the North Carolina State Bar if the member sends an email from that same email address to the State Bar acknowledging such service. A member who cannot, with due diligence, be served by registered or certified mail, designated delivery service, personal service, or email shall be deemed served by the mailing of a copy of the order to the member's last known address contained in the records of the North Carolina State Bar.

....

.1523 Noncompliance

(a) Failure to Comply with Rules May Result in Suspension

....

(b) Notice of Failure to Comply

The board shall notify a member who appears to have failed to meet the requirements of these rules that the member will be suspended from the practice of law in this state, unless the member shows good cause in writing why the suspension should not be made or the member shows in writing that he or she has complied with the requirements within the 30-day period after service of the notice. Notice shall be served on the member by mailing a copy thereof by registered or certified mail or designated delivery service (such as Federal Express or UPS), return receipt requested, to the last-known address of the member according to the records of the North Carolina State Bar or such later address as may be known to the person ~~effecting the attempting~~ service. Notice Service of the notice may also be served accomplished by (i) personal service by a State Bar investigator or by any ~~other~~ person authorized by Rule 4 of the North Carolina Rules of Civil Procedure to serve process, or (ii) email sent to the email address of the member contained in the records of the North Carolina State Bar if the member sends an email from that same email address to the State Bar acknowledging such service.

Proposed Amendments to The Plan of Legal Specialization

27 N.C.A.C. 1D, Section .1700, The Plan of Legal Specialization

The proposed amendments specify that the substantial involvement and CLE requirements for certification apply to the calendar years prior to application and clarify the standard for peer review.

.1720 Minimum Standards for Certification of Specialists

(a) To qualify for certification as a specialist, a lawyer applicant must pay any required fee, comply with the following minimum standards, and meet any other standards established by the board for the particular area of specialty.

(1) ...

(2) The applicant must make a satisfactory showing according to objective and verifiable standards, as determined by the board after advice from the appropriate specialty committee, of substantial involvement in the specialty during the five calendar years immediately preceding the calendar year of his or her application according to objective and verifiable standards. Such

substantial involvement shall be defined as to each specialty from a consideration of its nature, complexity, and differences from other fields and from consideration of the kind and extent of effort and experience necessary to demonstrate competence in that specialty. It is a measurement of actual experience within the particular specialty according to any of several standards. It may be measured by the time spent on legal work within the areas of the specialty, the number or type of matters handled within a certain period of time, or any combination of these or other appropriate factors....

(3) The applicant must make a satisfactory showing, as determined by the board after advice from the appropriate specialty committee, of continuing legal education in the specialty accredited by the board for the specialty, the minimum being an average of 12 hours of credit for continuing legal education, or its equivalent, for each of the three calendar years immediately preceding application....

(4) The applicant must make a satisfactory showing, as determined by the board after advice from the appropriate specialty committee, of qualification in the specialty through peer review, ~~by providing. The applicant must provide,~~ as references, the names of at least ~~five~~ ten lawyers, all of whom are licensed and currently in good standing to practice law in this state, or in any state, or judges, who are familiar with the competence and qualification of the applicant as a specialist. None of the references may be persons related to the applicant or, at the time of application, a partner of or otherwise associated with the applicant in the practice of law. The applicant by his or her application consents to confidential inquiry by the board or appropriate disciplinary body and other persons regarding the ~~applicant's~~ applicant's competence and qualifications to be certified as a specialist. An applicant must receive a minimum of five favorable peer reviews to be considered by the board for compliance with this standard.

(5)

(b)

Proposed Amendments to The Plan for Certification of Paralegals

27 N.C.A.C. 1D, Section .0100, The Plan for Certification of Paralegals

The proposed new rule creates an inactive status for certified paralegals who are suffering financial hardship, illness or disability, are on active military duty, or are following a military spouse to another state or country. To be reinstated to active status after two years or more of inactivity, an inactive certified paralegal must take 12 hours of CPE. After five years of inactive status, certification lapses and, to be certified again, the paralegal must apply and pass the certification exam. **The proposed rule is entirely new and is not, therefore, printed with bold, underlined type.**

.0123 Inactive Status Upon Demonstration of Hardship

(a) Inactive Status

The board shall transfer a certified paralegal to inactive status upon receipt of a petition, on a form approved by the board, demonstrating hardship as defined in paragraph (b) of this rule and upon payment of any fees owed to the board at the time of the petition unless waived by the board.

(1) The period of inactive status shall be one year from the designated renewal date.

(2) On or before the expiration of inactive status, a paralegal on inactive status must file a petition for (continued) inactive status or seek reinstatement to active status by filing a renewal application pursuant to Rule .0120 of this subchapter. Failure to petition for continued inactive status or renewal shall result in lapse of certification.

(3) A paralegal may be inactive for not more than a total of five consecutive years.

(4) During a period of inactive status, a paralegal is not required to pay the renewal fee or to complete continuing legal education.

(5) During a period of inactive status, a paralegal shall not be entitled to represent that he or she is a North Carolina certified paralegal or to use any of the designations set forth in Rule .0117(4) of this subchapter.

(b) Hardship

The following conditions shall qualify as hardship justifying a transfer to inactive status:

(1) Financial inability to pay the annual renewal fee and to pay for continuing legal education courses due to unemployment or underemployment of the paralegal for a period of three months or more;

(2) Disability or serious illness for a period of three months or more;

(3) Active military service; and

(4) Transfer of the paralegal's active military spouse to a location outside of North Carolina.

(c) Reinstatement before Expiration of Inactive Status

To be reinstated as a certified paralegal, the paralegal must petition the board for reinstatement by filing a renewal application prior to the expiration of the inactive status period and

must pay the annual renewal fee. If the paralegal was inactive for a period of two consecutive calendar years or more, during the year prior to the filing of the petition, the paralegal must complete 12 hours of credit in board approved continuing paralegal education, or its equivalent. Of the 12 hours, at least 2 hours shall be devoted to the areas of professional responsibility, or professionalism, or any com-

bination thereof.

(d) Certification after Expiration of Inactive Status Period

If the inactive status period expires before the paralegal petitions for reinstatement, certification shall lapse, and the paralegal cannot again be certified unless the paralegal qualifies upon application made as if for initial certification. ■

Proposed Ethics (cont.)

Opinion #7:

Lawyer X must consent prior to any direct communication by Attorney A with the tenant about the subject matter of the representation. See Opinions #1 and #2.

Inquiry #8:

In family law cases, it is often more efficient, economical, and potentially ameliorating for the spouses to communicate directly with each other about a range of subjects, particularly those relating to the ongoing care of children. Indeed, matters relating to child custody, child visitation, and property distribution are often handled more efficiently and economically outside the courtroom. If one of the parties to a family law case is a lawyer, may the lawyer/spouse communicate directly with the other spouse regarding matters related to the litigation?

Opinion #8:

Yes, provided the lawyer/spouse informs his/her lawyer in advance of his/her request to communicate directly with the other spouse, and counsel for both spouses agree on the scope and duration of direct communications between the parties. Consent of the spouse's lawyer may be granted at the beginning of the representation for the duration of the case unless revoked by the lawyer. Consent should be liberally granted when there is no potential for harm to the interests of the lawyer's client. If the lawyer/spouse is *pro se*, this discussion should occur between the lawyer/spouse and opposing counsel.

Inquiry #9:

In a family law case, if a court orders the parties to consult prior to making a decision about the children, may the lawyer/spouse communicate with the other spouse without the consent of the other spouse's lawyer?

Opinion #9:

Yes. Consent is not required if the communication is authorized by a court order. Rule 4.2(a). As noted in Comment [3], "a lawyer having...legal authorization for communicating with a represented person is permitted to do so."

Proposed 2011 Formal Ethics

Opinion 14

Outsourcing Clerical or Administrative Tasks

January 26, 2012

Proposed opinion rules that a lawyer must obtain client consent, confirmed in writing, before outsourcing its transcription and typing needs to a company located in India.

Inquiry:

Law Firm would like to outsource its transcription and typing needs to a company located in India. Specifically, voice files would be sent via email and some documents would be scanned to the company via email. The communications would, in turn, be transcribed to paper. The files would include information about client matters and work product regarding client matters. Law Firm investigated the security measures the company utilizes and found them to be extensive.

Is Law Firm required to disclose the outsourcing of these clerical tasks to its clients and obtain their informed written consent as contemplated by 2007 FEO 12?

Opinion:

Yes. 2007 FEO 12 provides that a lawyer must disclose the outsourcing of support services to an assistant in another country and obtain the client's informed written consent to the outsourcing. 2007 FEO 12 does not differentiate between the outsourcing of administrative as opposed to legal support services. Similarly, ABA Formal Opinion 08-451 (2008) provides that "where the relation-

ship between the firm and the individuals performing the services is attenuated, as in a typical outsourcing relationship, *no information protected by Rule 1.6* may be revealed without the client's informed consent." (Emphasis added.) The bar associations of New York and Ohio have reached similar conclusions. NY State Bar Ass'n. Comm. on Prof'l Ethics, Op. 2006-3 (2006); Ohio Ethics Op. 2009-6 (2009).

The ABA opinion notes the existence of unique risk factors that must be evaluated when client information is outsourced to a foreign vendor. As noted in the ABA opinion: [c]onsideration . . . should be given to the legal landscape of the nation to which the services are being outsourced, particularly the extent that personal property, including documents, may be susceptible to seizure in judicial or administrative proceedings notwithstanding claims of client confidentiality. Similarly, the judicial system of the country in question should be evaluated to assess the risk of loss of client information or disruption of the project in the event that a dispute arises between the service provider and the lawyer and the courts do not provide prompt and effective remedies to avert prejudice to the client.

The protection of client confidences is one of the most significant responsibilities imposed on a lawyer. Given the risk that a foreign jurisdiction may provide less protection for confidential client information than that provided domestically, the outsourcing of any task to another country that involves the disclosure of confidential client information requires disclosure and client consent confirmed in writing. Consent "confirmed in writing" denotes consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See Rule 1.0(c). The client's consent to the outsourcing may be incorporated into the employment agreement. ■

Law School Briefs

All of the law schools located in North Carolina are invited to provide material for this column. Below are the submissions we received this quarter.

Campbell University School of Law

Fourth Circuit Court of Appeals Holds Arguments at Campbell Law School—November 8 marked a historic day at Campbell Law School as the first all-North Carolina Fourth Circuit Court of Appeals panel of judges heard oral arguments at the school. 2010 marked the first year since the court's establishment in 1891 that North Carolina has had three judges sitting simultaneously on the court. Hearing cases in insurance law, civil rights, and civil matters, Judges Albert Diaz, Allyson Duncan, and James Wynn Jr. represented the Fourth Circuit. More than 75 Campbell Law students, staff, faculty, and federal officials attended the event.

Campbell Law Hosts 2011 Legal Writing Institute Workshop—Campbell Law School hosted a Legal Writing Institute One-Day Workshop on Friday, December 2. Panel discussions addressed tips and best practices for teaching legal writing, new developments in legal research, and instructional innovations, and were led by experienced instructors from several prominent law schools. Campbell Law Dean Melissa Essary provided a keynote address, and several professors and adjunct faculty from Campbell Law served as instructors for the workshop.

Professor Sawchak Certified as Appellate Specialist by North Carolina State Bar—Professor Matt Sawchak has been certified as a specialist in appellate practice by the North Carolina State Bar Board of Legal Specialization. He teaches civil procedure and antitrust, among other courses, at Campbell Law School. In addition to serving on the Campbell Law faculty, Sawchak practices appeals, antitrust, and business litigation at Ellis & Winters, LLP in Raleigh. As one of his many professional activities he has chaired the North Carolina Bar Association's Appellate Rules Committee.

Charlotte School of Law

CharlotteLaw Teams Continue Moot Court Success—A student team from Charlotte School of Law took home top honors for Best Overall Team and the Best English Team at the University of the Free State Moot Court Competition October 8 in Bloemfontein, South Africa. This is the second consecutive year a CharlotteLaw team has won the top honors at the international competition. Abbey Mrkus and Jeff Poulsen, second-year students at CharlotteLaw, traveled to South Africa to participate in the two-day competition.

On November 18 and 19, 3L students Chris Campbell, Bo Caudill, and Lauren Nennig competed in Region IV of the 62nd Annual National Moot Court Competition sponsored by the Young Lawyers Committee of the Association of the Bar of the City of New York and the American College of Trial Lawyers and hosted by the Virginia Bar Association Young Lawyers Division in Richmond, Virginia. The team successfully advanced to the semi-finalist round where they were ranked third out of a total of 24 teams.

Experiential Education Programs Expand—In 2007, Charlotte School of Law started a formal *Pro Bono* Program, and in 2008 it started an Externship Program. The school opened its first clinic providing legal services under the supervision of a faculty member in the spring of 2011. This clinic, the Family Advocacy Clinic, represents parents in cases in which abuse or neglect has been alleged. Today, the school has an additional five direct service clinics: Entrepreneurial and Non-Profit Law Clinic, Civil Rights Clinic, Elder Law Clinic, Unemployment Benefits Clinic, and Immigration Clinica Lab.

December Graduates Honored at Ceremony—Forty-eight graduates crossed the stage on December 16 when Charlotte School of Law conferred Juris Doctor Degrees as part of its December recognition and hooding ceremony. The keynote speak-

er for the ceremony was R. Andrew Murray, district attorney, 26th Prosecutorial District of North Carolina, which includes Charlotte and Mecklenburg County.

Duke Law School

Levi Reappointed as Dean—David F. Levi was reappointed in November to a second five-year term as dean of Duke Law School. His new term will begin on July 1, 2012. Levi joined Duke Law School as dean and professor of law in 2007 after serving as chief United States district judge for the Eastern District of California.

"[Levi's] tenure at the school has been marked by the creation of wonderful new opportunities for law grads, an extraordinary record of developing professional opportunities for students, and close attention to faculty development," said Duke University Provost Peter Lange.

Duke Grads Head to Supreme Court Clerkships—Katherine Crawford Yarger '08 and Emily Kennedy '10 will clerk for Associate Justices Clarence Thomas and Samuel Alito, respectively, during the Supreme Court's 2012-2013 term. They will be the fifth and sixth Duke Law alumni to clerk at the Supreme Court over three terms.

Justice Stevens to Address Duke's 2012 Graduates—Supreme Court Associate Justice John Paul Stevens, who retired in June 2010 after 35 years on the high court, will speak at Duke Law's annual hooding ceremony on May 12.

Students, Alumna Receive Public Interest Fellowships—Caitlin Swain '12 has received a two-year Skadden Fellowship to provide legal support to grassroots organizations in North Carolina that work with at-risk youth to enforce their constitutional right to a quality education. The fellowship will support her work for the Advancement Project.

Joanna Darcus '12 has been awarded a one-year fellowship from the Independence Foundation to work with Community Legal Services of Philadelphia to combat abusive debt collection practices on multiple fronts.

Lauren Fine '10 has been awarded the two-year Juvenile Law Center's Zubrow Fellowship in Children's Law, which will provide her an opportunity to work on behalf of children in the delinquency and dependency systems.

Elon University School of Law

Second Annual Billings, Exum & Frye National Moot Court Competition – March 29-31—Due to tremendous interest, this year's field has been expanded to 34 teams representing 21 law schools. Volunteer judges are crucial to the event's success; if you can judge, please contact Prof. Alan Woodlief, director of the Moot Court Program, at awoodlief@elon.edu.

New Pro Bono Board—Third year Elon Law students Ashley Clark, Marina Emory, and Melissa Westmoreland led the creation of the *Pro Bono* Board in November 2011 to support *pro bono* initiatives at the law school, encourage the student body to participate in *pro bono* endeavors, and recognize students who demonstrate exceptional commitment to *pro bono* service. Elon Law's classes of 2009, '10, and '11 contributed more than 20,000 hours of community service each through clinics, programs, classes, and student-led volunteer initiatives.

New Journal of Leadership and Law—The first edition of the online *Journal of Leadership and Law* was published as a special section of the Elon Law website on October 21, 2011. The publication includes articles by lawyers and scholars of law, as well as interviews with attorneys in leadership positions, exploring dimensions of leadership in the legal profession. Law student Jeffrey Koehler '12 is the *Journal's* first editor-in-chief. Visit law.elon.edu/leadership to read the first edition.

New Student Advocacy Board—The board enables students to strengthen trial advocacy skills. Members of the board organize into trial teams, receive coaching from law professors and accomplished trial attorneys, and compete in multi-day national advocacy competitions. Law students Catherine Hallman '12 and Megan Youndblood '12 spearheaded efforts to form the board, researching similar programs and helping to organize a competition at the law school to select founding members. The board complements the school's existing Moot Court Board and Trial Practice Program.

North Carolina Central University School of Law

North Carolina Central University School of Law has begun the Spring 2012 semester with the exciting news of having been voted into full membership with the Association of American Law Schools (AALS). The AALS is the hallmark association of the legal academy wherein membership is based upon a law school possessing a culture of scholarship demonstrated by faculty production of research and published scholarship at levels meeting AALS standards. Application for membership is a lengthy and rigorous process. On January 5, 2012, the Board of Delegates of the AALS unanimously voted to admit NCCU School of Law as a full member.

On February 10 the law school will be the site for a conference of the World Justice Project (WJP). The WJP is an international organization with a mission to promote the rule of law. The event will bring together undergraduate students from colleges and universities throughout North Carolina for conversation and dialogue in focused discussions on the importance of the rule of law. Former Duke School of Law professor and current dean of the University of California Irvine School of Law Irwin Chemerinsky will be the keynote speaker. North Carolina Supreme Court Justice Mark Martin and Dean Raymond Pierce are the co-conveners of the event.

On March 23, 2012 the law school will host a three-judge panel of the US Fourth Circuit Court of Appeals. The court will hear actual oral arguments in the law school's Earl Warren Moot Court Room.

The law school is moving forward to launch a summer Maritime Law Program in June 2012 on the campus of the University of North Carolina at Wilmington. The program is scheduled to offer four courses: admiralty law I, admiralty law II, maritime law and personal injury, and coastal management and public policy.

University of North Carolina School of Law

National Jurist Ranking—UNC School of Law was ranked No. 4 on the National Jurist magazine's annual list of the nation's "Best Value Law Schools," announced November 7.

Center for Media Law & Policy—The

UNC Center for Media Law and Policy convened high profile media scholars, professionals, attorneys, and community leaders on January 20 for a workshop to discuss an FCC report and recommend policies for how Internet, television, and mobile broadband service providers could help promote local watchdog journalism in North Carolina and the nation.

Center for Poverty, Work & Opportunity—The Poverty Center joins the NC Chapter of the NAACP and the NC Justice Center on the "Truth and Hope Tour of Poverty in North Carolina." The first leg of the tour traveled through the northeastern portion of the state on January 19 and 20, 2012. Visit law.unc.edu/centers/poverty.

Murphy Distinguished Lecture Features Connie Rice—Noon, February 9. Constance L. "Connie" Rice, a prominent American civil rights activist and lawyer, is also the co-founder and co-director of the Advancement Project in Los Angeles. She has received more than 50 major awards for her work in expanding opportunity and advancing multi-racial democracy. She is the cousin to former US Secretary of State Condoleezza Rice.

CLE Programs—Recent and upcoming CLE programs include the Festival of Legal Learning, Chapel Hill, February 10-11; the J. Nelson Young Tax Institute, Chapel Hill, April 26. Visit law.unc.edu/cle.

Wake Forest University School of Law

US Supreme Court Justice Ruth Bader Ginsburg will be a guest lecturer during the Wake Forest University School of Law's Venice and Vienna Study Abroad Programs in the summer of 2012. "We are thrilled that Justice Ginsburg has so graciously agreed to once again share her expertise with our students in our study abroad programs," said Dean Blake D. Morant. The associate justice, who will be guest lecturing for a week during each program in July 2012, has a long history with Wake Forest Law School. In May, Ginsburg gave the keynote address at a luncheon celebrating the kick off of the law school's Program in Washington, DC, which was held at the offices of Morgan, Lewis & Bockius, LLP. In 2008, Executive Associate Dean for Academic Affairs Suzanne Reynolds co-taught a comparative constitutional law class

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Client Security Fund Reimburses Victims

At its January 26, 2011, meeting, the North Carolina State Bar Client Security Fund Board of Trustees approved payments of \$114,133.46 to seven applicants who suffered financial losses due to the misconduct of North Carolina lawyers.

The new payments authorized were:

1. An award of \$18,245.23 to a former client of Lisa Arnold of Cary. The board found that Arnold was retained to handle the sale of a client's business and an account dispute with the client's vendors. Arnold was administratively suspended from the practice of law at the time she was retained and was never reinstated. Additionally, Arnold took more than the agreed fee without her client's authorization or consent. Arnold was disbarred on January 2, 2012.

2. An award of \$84,113.23 to a former client of Jennifer Green-Lee of Clayton. The board found that Green-Lee was retained to handle the applicant's real estate closing. Green-Lee failed to disburse the sale proceeds to the seller. Due to misappropriation from

her trust account, Green-Lee's trust account balance was insufficient to pay all of her clients' obligations. Green-Lee was disbarred on August 19, 2011. The board previously reimbursed three other Green-Lee clients \$25,046.20.

3. An award of \$1,500 to a former client of John Halstead of Elizabeth City. The board found that Halstead was retained to handle a client's divorce and property settlement. Halstead failed to provide any valuable legal services for the fee paid in the three years prior to his death. Halstead died on February 3, 2010.

4. An award of \$400 to a former client of Mark Jenkins of Waynesville. The board found that Jenkins was retained to file a contempt action against a client's ex-husband for failure to comply with their property settlement agreement. The parties eventually settled and signed a memorandum of judgment. Jenkins failed to prepare the order until a year later. When the client's ex-husband failed to comply with the new order, the client asked

Jenkins to file another contempt action. Jenkins failed to provide any valuable legal services for the fee paid for the second contempt filing. Jenkins was disbarred on March 31, 2011, and died on April 5, 2011. The board previously reimbursed seven other Jenkins clients \$30,700.

5. An award of \$675 to a former client of Mark Jenkins. The board found that Jenkins was retained to handle a client's civil claim and a custody matter. Jenkins failed to provide any valuable legal services for the fee paid.

6. An award of \$1,700 to a former client of Mark Jenkins. The board found that Jenkins was retained to handle a client's divorce and property settlement. Jenkins failed to provide any valuable legal services for the fee paid.

7. An award of \$7,500 to a former client of Lyle Yurko of Charlotte. The board found that Yurko was retained to get a client's driving privileges reinstated. Yurko abandoned his practice without providing any valuable legal services for the fee paid. The board previously reimbursed 11 other Yurko clients \$96,080. ■

State-Wide Mentoring Program Seeks to Build Professionalism and Competence in the Next Generation of Attorneys

The North Carolina Bar Association has implemented a mentoring program that takes into account the real-world needs of North Carolina's new lawyers. Across the state, local bars are reporting a significant increase in young lawyers hanging out their own shingles. With so many attorneys practicing law without the safety net of a more experienced partner or senior associate, the legal community has braced itself for an onslaught of malpractice claims and complaints from the clients of these legal novices.

In response to the growing concerns, the NC Bar Association's Young Lawyers Division created a task force to create a mentoring program. With Past-President Gene Pridgen at the helm, the group designed a mentoring pro-

gram that is flexible, efficient, and a great resource for new attorneys.

The task force created a program with two tracks. The first is designed to build professionalism, ethics, civility, and civic-mindedness. The second track is for increasing competency in a practice area.

The first track is called Traditional Mentoring. A new attorney pairs with an experienced lawyer for one year. Together they develop and work toward a set of professional goals. The second track is called Situational Mentoring. A young lawyer, unfamiliar with a practice area, is paired with an expert in that field who can guide the new attorney. Situational Mentoring is a short-term relationship, usually lasting no more than one or two

conversations.

Both tracks are an excellent resource for new attorneys who want to be sure they are providing correct legal advice to their clients. Additionally, the program helps young lawyers develop their professional networks, potentially building their referral circles as well as a community knowledge base.

NC lawyers with four or less years of experience is encouraged to register for the program. Likewise, experienced attorneys who are looking for ways to give back should register.

To sign up, and for more information about the NCBA Mentorship Program, please visit ncbar.org/mentoring. For questions, please contact Joyce Brafford at jbrafford@ncbar.org. ■

Seeking Distinguished Service Award Nominations

The John B. McMillan Distinguished Service Award program honors current and retired members of the North Carolina State Bar throughout the state who have demonstrated exemplary service to the legal profession. Such service may be evidenced by a commitment to the principles and goals stated in the Preamble to the Rules of Professional Conduct, for example; furthering the public's understanding of and confidence in the rule of law and the justice system; working to strengthen legal education; providing civic leadership to ensure equal access to our system of justice for all those

who, because of economic or social barriers, cannot afford or secure adequate legal counsel; seeking to improve the administration of justice and the quality of services rendered by the legal profession; promoting diversity and diverse participation within the legal profession; providing professional services at no fee or a reduced fee to persons of limited means or to public service or charitable groups or organizations; encouraging and counseling peers by providing advice and mentoring; and fostering civility among members of the bar.

Awards will be presented in recipients' dis-

tricts, usually at a meeting of the district bar. The State Bar Councilor from the recipient's district will participate in introducing the recipient and presenting the certificate. Recipients of the Distinguished Service Award will also be recognized in the State Bar *Journal* and honored at the State Bar's annual meeting in Raleigh. Members of the bar are encouraged to nominate colleagues who have demonstrated outstanding service to the profession. The nomination form is available on the State Bar's website, www.ncbar.gov. Please direct questions to Peter Bolac at the State Bar office in Raleigh, (919) 828-4620. ■

Law School Briefs (cont.)

in Venice with Ginsburg, who served as a guest teacher as part of the law school's study abroad program. Her late husband, Georgetown University Professor of Law Martin Ginsburg, also taught in the 2008 Venice Summer Abroad Program with Professor Joel Newman. In 2005, Ginsburg

visited Wake Forest as part of the law school's "A Conversation With ..." series, which brings speakers to campus to tell their stories. Reynolds interviewed Ginsburg about her life and career. Ginsburg was the second woman to serve on the high court. She was appointed by President Bill Clinton in 1993. "I am truly looking forward to having Justice Ginsburg in our classes in Vienna

and Venice where she will not only influence our Wake Forest students, but will also have direct interactions with students from the University of Vienna and the University of Padua as well," said Associate Dean of International Affairs Richard Schneider. "It will be a truly international educational experience for her that will benefit the students immeasurably." ■

In Memoriam

Olubayo Oyedele Agbetunsin
Oadby Leicester, UK

Robert Wallace Bradshaw Jr.
Charlotte

Daphene L. Cantrell
Huntersville

Robert Gordon Chambers
Charlotte

Gail Poole Fannon
Boone

Harley B. Gaston Jr.
Belmont

Jimmy Wade Goodman
Fayetteville

Richard F. Gordon
Beaufort

William Alexander Graham III
Roaring Gap

Harry Johnston Grim
Charlotte

Charles Leslie Hicks Jr.
Laurinburg

Ralph Lee Hicks
Cashiers

John D. Johnston Jr.
Asheville

Janet K. Ledbetter
Hillsborough

Billy Irvin Long Jr.
Greensboro

Romallus O. Murphy
Greensboro

Jeffrey A. Stonerock
Vienna, VA

Sarah Lindsay Tate
Raleigh

Wesley Darrell Whitley
Lexington



LAWYERS
MUTUAL

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